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Supreme Court, U.S.
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No. A-145

In the Supreme Court of the United States

OCTOBER TERM, 1979

LUMBER, PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362,
Appellant,

v.

ROBERT A. WONDZELL and THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS,
Appellees.

On Appeal from the Supreme Court of Alaska

JURISDICTIONAL STATEMENT

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20 FCP Cases 514

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes	3
Raising the Federal Question	6
Statement of the Case	7
The Question Is Substantial	10
Conclusion	19
Appendix	A1

TABLE OF AUTHORITIES

CITATIONS

Cases — Page

Anderson v. *General Dynamics*, 589 F.2d 397 (9th Cir., 1978) 10, 12, 15, 16, 17, 18

Buckley v. *American Federation of TV and Radio Artists*, 496 F.2d 305 (2nd Cir., 1975 11

Burns v. *Southern Pacific Transportation Company*, 589 F.2d 403 (9th Cir., 1978) 10, 12, 15, 16, 17, 18

Jackson v. *Kelly*, 557 F.2d 735 (9th Cir., 1977) 15

Labor Board v. *GMC*, 373 U.S. 734 (1962) 11, 13

Machinists Union v. *Street*, 367 U.S. 740 (1961) 12

McDaniel v. *Essex International*, 571 F.2d 338 (6th Cir., 1978) 18

Radio Officer's Union v. *Labor Board*, 347 U.S. 17 (1953) 16

Railway Employees v. *Hanson*, 351 U.S. 225 (1955) 11

Scandia Log Homes v. *L.P.I.W.*, NLRB Case No. 19-CA-10925 ..... 17, 18

TWA v. *Hardison*, 432 U.S. 63 (1977) 14, 15

TABLE OF AUTHORITIES (Cont.)

Statutes

29 U.S.C. § 158 (a) (3) ..... *passim*

29 U.S.C. § 169 (1966 Supp.) 4, 14, 18-19

28 U.S.C. § 1259(2) 2

42 U.S.C. § 2000e-2 ..... *passim*

National Labor Relations Act, Ch. 372, § 8(3), 49 Stat. 449 (1935) 13

AS 18.80.200-280 ..... 5, 6

Other Authorities

118 Congressional Record 13

110 Congressional Record 13

Report of Presidential Emergency Board No. 98, App't'd. Exec. Order 10306, N.M.B. Case No. A3744 (1951) 12

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STATE COMMISSION FOR HUMAN RIGHTS,
Appellees.

On Appeal from the Supreme Court of Alaska

JURISDICTIONAL STATEMENT

LPIW, appellant, appeals from a final judgment of the Supreme Court of Alaska, dated June 4, 1979, holding that AS 18.80.200-280 requires the union to accommodate the religious beliefs of its members by allowing them to contribute a sum equal to union dues to a non-religious charity in derogation of a union security agreement sanctioned by 29 U.S.C. 158(a)(3).

OPINIONS BELOW

The original opinion of the Alaska Supreme Court, which appears in the appendix hereto, p. A16, *infra.*, is reported at 583 P.2d 860 (1978, Alaska). The result was reversed on rehearing; the opinion, dated June 4, 1979, is not yet reported. It is reprinted in the appendix hereto, p. A33, *infra.*

The opinion of the Alaska Superior Court, dated October 15, 1975, is not reported. It is reprinted in the appendix, hereto, p. A1, *infra.*

JURISDICTION

The original judgment of the Supreme Court of Alaska, upholding the appellant's federally sanctioned contract rights, was entered September 15, 1978. The court subsequently granted appellee's motion for rehearing on June 4, 1979 and entered a judgment vacating the result of their original judgment. It thereby abridged appellant's contract rights.

A notice of appeal to the court was duly filed July 11, 1979. A request for an extension of time in which to docket this appeal was filed August 13, 1979 and granted August 16, 1979.

This appeal is being docketed in this court within 90 days plus the 45 day extension from the entry of the judgment below. The jurisdiction of this court is invoked under 28 U.S.C. 1259(2).

QUESTIONS PRESENTED

May a labor union be forced to waive its contractual right to a union shop, sanctioned under 29 U.S.C. 158(a)(3), in order to reasonably accommodate the religious beliefs of an employee as mandated by the Alaska State Human Rights Law, AS 18.80.200-280?

STATUTORY PROVISIONS

Federal Statutes

National Labor Relations Act

29 U.S.C. § 158(a)

> It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

29 U.S.C. § 169. Individuals with religious convictions

Any employee of a health care institution who is a member of and adheres to established and graditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a non-religious charitable fund exempt from taxation under section 501(c)(3) of the Internal revenue Code [26 U.S.C. § 501(c)(3)], chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

Title VII, 1964 Civil Rights Act

42 U.S.C. § 2000e-2

(a) It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any indiidual with respect to his compensation, terms, conditions, or privileges or employ-

ment, because of such individual's race, color, religion, sex or national origin . . .

(c) It shall be unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify its membership or applicants for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e(j) (1972 Amendment)

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

State Statutes

Alaska Human Rights Law

AS 18.80.220

(a) It is unlawful for

(1) an employer to refuse employment to a person, or to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, religion, color or national origin, or because of his age, physical handicap or sex when the reasonable demands of the position do not require age, physical handicap or sex distinction;

(2) a labor organization, because of a person's sex, age, race, religion, color or national origin, to exclude or to expel him from its membership, or to discriminate in any way against one of its members or an employer or an employee . . .

RAISING THE FEDERAL QUESTION

At the earliest stage of these proceedings, the appellant raised the federal question as part of a preemption claim: that the union's rights under section 8(a)(3) were not subject to abridgment by state law. In the words of the trial court:

> "The dispute before this court centers on the relationship between state law and the federal constitution and the protection of union shops under federal law. It is the *validity* of the union shop agreement as it pertains to the plaintiff, and not activities designed to lead to such an agreement . . . which is before this court. . . . Jurisdiction over the claims under state law is a more difficult issue because it tends to become confused with federalism problems, i.e., conflicts between state and federal law. . . . What must be decided is: (1) is there a conflict between state and federal law; (2) if so, what does the federal law mean; (3) if not, what does state law mean."

See Opinion of Superior Court, pp. A, 4-7, *infra*.

This claim was reiterated by the appellant before the Supreme Court of Alaska. That court, in vacating the result of its prior opinion, construed 29 U.S.C. 158(a)(3) to permit a religious objector to pay the equivalent of his union dues to charity. It thus considered and expressly rejected this claim.

STATEMENT OF THE CASE

Appellant, Lumber Production & Industrial Workers Local 2362 (hereafter LPIW) is the exclusive collective bargaining agent for all production maintenance employees of Alaska Wood Products, Inc., Wrangel, Alaska (hereinafter AWP), except those employees excluded by law.

At all relevant times, LPIW and AWP have operated pursuant to a collective bargaining agreement, authorized under 29 U.S.C. 158(a)(3), which required all employees to become members of the LPIW and thereafter maintain such membership in good standing.

Mr. Wondzell, an employee of AWP, had been a member of the LPIW for nearly 10 years prior to August 14, 1974. Relations between Mr. Wondzell and

the LPIW had been harmonious with the union, at one point, assisting Mr. Wondzell when he wished to be excused from Saturday work. On or about August 14, 1974, Mr. Wondzell notified John Baker, President of Local 2362, that he was resigning from the union and would not pay further dues but instead would pay an equivalent amount to charity. Following non-receipt of dues, LPIW on or about October 22, 1974, notified Wondzell and AWP that unless dues for the preceding 3 months were paid by October 31, Wondzell would no longer be a member in good standing as required by the union's contract. On November 1, 1974, with Wondzell still in arrears, the union requested termination in accordance with the contract.

Negotiations occurred in an effort to prevent termination. The union offered to permit Mr. Wondzell to withdraw from membership, provided he continue to pay dues. The union further offered that all amounts received would be placed in the contingency fund, a form of disaster fund for AWP employees that is not used for collective bargaining purposes. Wondzell rejected these offers, offering instead to contribute his dues to a non-religious charity. The result of his offer would enable him to receive all the fruits of collective bargaining without paying his share of the costs. The offer was refused by the union.

At or about the time the union's proffered compromise was rejected, Wondzell initiated proceeding before the Federal and State Civil Rights Commissions. The Alaska Human Rights Commission ap-

parently waived processing the claim at the request of Wondzell. The Federal EEOC also declined to handle the case and notified Wondzell of his right to file an action under Section 706(f) of Title VII.

On November 22, 1974, a complaint and a motion requesting a TRO and preliminary injunction was filed by Wondzell in the State Superior Court in Juneau, naming AWP and LPIW as defendants. The complaint alleged violations of AS 18.80.220 and the Constitutions of Alaska and the United States. A TRO was issued on November 23, 1974. On December 9, AWP and LPIW first raised the federal question in this case by moving that the complaint be dismissed on the grounds that the Superior Court had no jurisdiction over the subject matter because the relevant issues were pre-empted by Act of Congress. On December 17, the trial court denied AWP's motion for an injunction and LPIW's motion to dismiss.

On April 4, 1975, trial on the merits took place. Evidence was introduced regarding the impact of Wondzell's actions on the union. There was testimony that other employees were threatening to withdraw their support of the union if Wondzell succeeded in not paying dues. On October 15, 1975, the trial court issued an eleven-page opinion. The court ruled that it had jurisdiction to decide the case on its merits. The court rejected the constitutional claims and ruled that under AS 18.80 et. seq. Wondzell's religious beliefs must be accommodated. The court found that the union's proffered accommodation was reasonable; that to deprive the union of Wondzell's dues would

cause undue hardship to the union by diminishing its ability to carry out its bargaining function; that Wondzell had no right to avoid paying his pro rata share since it was proven that he reaped full benefits of collective bargaining.

Wondzell appealed this ruling to the Alaska Supreme Court. The court, on rehearing, held the union had a duty to accommodate Wondzell's religious beliefs. In vacating the result of its earlier opinion, the court explicitly relied upon two Ninth Circuit Court of Appeals cases: *Burns* v. *Southern Pacific Transportation Company*, 589 F.2d 403, cert. denied — U,S, — (1978) and *Anderson* v. *General Dynamics*, 589 F.2d 397, cert. denied — U.S. — (1978). (Copies of these opinions can be found in the appendix hereto, pp. A41-69.) *Anderson* held that substitute payments to charities by religious objectors did not cause undue hardship to labor unions as a matter of law. *Burns* held that the loss by the union of one worker's dues was *de minimis*. Both opinions viewed the union's free rider arguments as hypothetical. Citing these two cases, the Alaska Supreme Court reversed itself and held that the union had not met its burden of proof regarding undue hardship.

THE QUESTIONS ARE SUBSTANTIAL

The state court has interpreted the state anti-discrimination statute in derogation of federal labor law by holding that appellee Robert Wondzell may refrain from paying dues to appellant, LPIW, in spite

of appellant's union security agreement and 29 U.S.C. 158(a)(3). The Alaska Supreme Court has thereby judicially fashioned an exception to section 8(a)(3) of the National Labor Relations Acts which explicitly sanctions such agreements. The court is requiring the union, which has contractually secured such an agreement, to waive its right to dues from any worker who has "religious" objections to financially supporting labor unions. As a result, these religious objectors are allowed to receive all the benefits of the collective bargaining process without paying their fair, pro rata share of the costs.

This class of religiously motivated "free riders" is in direct conflict with federal labor policy. See *Buckley* v. *American Federation of TV and Radio Artists*, 496 F.2d 305 (2nd Cir., 1974). The goal of the federal labor statutory scheme is industrial peace and stability. *Railway Employees* v. *Hanson*, 351 U.S. 225 (1955). Union security agreements are basic to that scheme. See *Labor Board* v. *GMC*, 373 U.S. 734 (1962). They insure financially strong unions which participate in the collective bargaining process. The Alaska Supreme Court's opinion undermines that policy by depriving the union of the financial support of Mr. Wondzell and those like him. It creates a class of privileged individuals with its concomitant impacts on worker morale and efficiency.

The importance of union security provisions to federal labor policy is well documented in the opinions of this court. In construing the Railway Labor Act, which contains security provisions parallel to those

involved in the instant case, this court found that the problems created by "free riders" were instrumental in Congressional inclusion of the union security provisions in the Act. *Machinists Union* v. *Street*, 367 U.S. 740 (1961). Quoting the Presidential Emergency Board referred to in that opinion, the court reported:

> "Individuals who do not share with their fellow employees the cost of the union's activities, the benefits of which they are perfectly willing to accept, present a problem in equities which is very real. They incur the displeasure and resentment of those who are members, and this may cause frictions and feuds which will lead to disunity in the normal causes of the employees, a result definitely not in keeping with the purposes of the Railway Labor Act." *Report of Presidential Emergency Board No. 98*, Appointed Executive Order 10306, N.M.B. Case No. A3944 (1951).

The Alaska Supreme Court relied upon *Burns* v. *Southern Pacific*, *supra.*, (hereinafter *Burns*), and *Anderson* v. *General Dynamics*, *supra.*, (hereinafter *Anderson*), both of which held that Title VII, 42 U.S.C. 2000e-2, takes precedence over section 8(a)(3)'s absolute language. Thus the court below reasoned that the Alaska Statute, construed in conformity with Title VII, prevails over section 8(a)(3).

There is nothing in the legislative history of Title VII or the 1972 Amendments thereto to support the Alaska Supreme Court's interpretation. In fact, in 1964 Congress was specifically told Title VII would have no effect on the NLRA. Senator Clark, one of Title VII's sponsors, read a Department of Justice

memorandum outlining Title VII's impact on existing statutes: "Title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and *these duties would continue to be enforced as they are now.*" 110 Cong. Rec. 7207 (1964) (emphasis added).

In 1972, there was no mention of the NLRA, the focus of debate being Sabbatarianism. 118 Cong. Rec. 705-731. Thus, there is no evidence that Congress intended to abridge section 8(a)(3) rights when it enacted Title VII and its amendments.

The Alaska Court's interpretation also overlooks the history and development of union security provisions. Some sort of union security has been a part of federal labor law since its inception in 1935. See National Labor Relations (Wagner) Act, ch. 372, § 8(3), 49 Stat. 449 (1935). Section 8(a)(3) is itself a significant attempt to accommodate the rights of the minority of the work force with objections to compulsory union membership while at the same time preserving and fostering those national policies served by strong labor unions. It cuts the incidents of union membership to its financial core: the payment of dues or its equivalent. *Labor Board* v. *GMC*, 373 U.S. 734, 742 (1962). Its touchstone is equality: all those who reap the benefits of collective bargaining must pay their fair share of the costs. The Alaska Court's decision discriminates against the majority of workers who, because of their religious beliefs or lack thereof, must contribute the dues not forthcoming from these "free riders". Such discrimination violates the spirit

of Title VII as well as the NLRA. See *TWA* v. *Hardison*, 432 U.S. 63 (1977).

The recent actions of Congress confirm the conclusion that it continues to stand behind section 8(a)(3) as written. Since the passage of Title VII, Congress has repeatedly resisted attempts to directly create exceptions to section 8(a)(3).[1] Congress would not do by indirection, through Title VII, that which they have refused to do directly.

In 1974, Congress enacted the Health Care Amendments to the NLRA which brought employees of certain health care institutions under the NLRB's jurisdiction. Section 3 of the act, codified at 29 U.S.C. 169, creates a narrow exception to section 8(a)(3). It allows hospital employees with religious objections to union membership to contribute the equivalent of their dues to charity. This is identical to the accommodation which the Alaska Court says is Mr. Wondzell's right under Title VII and the Alaska Human Rights Act. Had Congress intended such a result to arise under

[1] H.R. 1666, 89th Cong., 1st Sess. (1965), a bill to exempt persons with religious convictions from the union membership requirement of National Labor Relations Act died in Committee; S. 3203, 89th Cong., 2d Sess. (1966), a bill to protect persons conscientiously opposed to union membership was defeated; S. 3153, 89th Cong., 2d Sess. (1966), a bill making it unfair labor practice under National Labor Relations Act to require persons conscientiously opposed to union membership to join them was defeated; S. 2108, a bill to make it an unfair labor practice for a labor organization to discriminate on account of race, color, religion or national origin died in Committee; and H.R. 3384, 94th Cong., 2d Sess. (1976), a bill to exempt religious objectors from the union membership requirement of the NLRA was referred to the Senate Committee on Human Resources in November, 1977 where no action on it has been taken.

Title VII, enactment of section 169 would be superfluous. The courts should avoid construing an act of Congress as superfluous, particularly when there is an alternative interpretation. *Jackson* v. *Kelly*, 557 F.2d 735 (9th Cir., 1977).

The lower federal courts and the Alaska Supreme Court have viewed *Wondzell*, *Burns* and *Anderson* as discrimination cases in which federal labor law is peripherally involved. On the contrary, the central issue in this case is the efficacy of federal labor law, and section 8(a)(3) in particular. The issue to be decided is whether Congress has abridged the union's rights under section 8(a)(3) by the passage of Title VII. Absent a clear and express indication from Congress that that is what they intended to do, the courts should not fashion exceptions to section 8(a)(3)'s unqualified language. See *TWA* v. *Hardison*, 432 U.S. 63, 79 (1977).

The Alaska Supreme Court, in relying upon *Burns* and *Anderson*, has rejected the union's contention that "free riders" create undue hardship as a matter of law (*Anderson*) and has held that the loss of Wondzell's dues by the union is *de minimis* (*Burns*). Thus the court concluded the union failed to carry its burden of proof as to undue hardship.

It is the LPIW's position that "free riders" create significant morale problems within the work force with their concomitant costs in decreased efficiency, industrial peace, and stability. The existence of section 8(a)(3) and the legislative history thereto, establishes that Congress shares that view. In the words

of this court, the Taft-Hartley Act demonstrates Congressional recognition of "the validity of the union's concern about 'free riders'." *Radio Officer's Union* v. *Labor Board*, 347 U.S. 17, 41 (1953).

The court in *Anderson* characterized these hardships as hypothetical. "Undue hardship cannot be proved by assumptions nor by opinions based upon hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." *Anderson, supra.* at 402. In *Burns*, the court said: "An employer or union would have to show . . . actual imposition on co-workers or disruption of the work routine." *Burns, supra.* at 407. This position overlooks section 8(a)(3) and its legislative history; it characterizes as hypothetical a problem Congress has seen as sufficiently serious to warrant Congressional action. It gives no weight to the opinions of this court characterizing the union's concerns as valid.

The Alaska Court's view demands that the LPIW, and other unions similarly situated, produce evidence of actual labor unrest, violence or strikes; that is, objective evidence that "free riders" cause labor unrest. Not only is such a burden unduly severe, but it undermines the policies embodied in the NLRA. It serves to encourage conflict, hence instability, within the labor force since it appears that only in this way can unions convince a court that "free riders" cause undue hardship.

The Alaska Court, once again following the approach taken in *Burns*, has held that since the record reveals no other religious objectors in the bargaining unit beyond Wondzell, the loss of his dues is *de minimis*. Thus the efficacy of any union's security agreement is tied to the number of religious objectors in the bargaining unit. This calls into question the enforceability of literally hundreds of otherwise valid, federally sanctioned contract clauses. The result is that neither labor, management, nor the employees know with certainty their rights under their contracts.

The LPIW is involved in another objector controversy which is now before the NLRB: *Scandia Log Homes* v. *LPIW*, Case No. 19-CA-10925. (The formal charge and supporting documentation is reproduced in the appendix hereto, pp. A70-77.) Three members of an eight-person bargaining unit are claiming exemption from union dues for religious reasons. The union stands to lose 35% of its financial support if these workers are, in fact, exempt. It is not clear under the *Burns, Anderson* or *Wondzell* decisions if that loss constitutes undue hardship. The employer claims it does not. If he is right, then there is little left of section 8(a)(3) and the policy underlying it.

Scandia Log Homes, relying upon the Ninth Circuit cases, has refused to enforce the union security clause against these religious objectors. (See appendix, p. A79.) A fourth employee, who refused to pay dues for non-religious reasons, has been fired. (See appendix, pp. A75, 84.) while the record is not clear as

to why he refused, it seems unlikely he was unaffected by the actions of his fellow workers. The Regional Director of Region 19, NLRB has viewed the employer's refusal to honor the contract as a violation of section 8(a)(3). A complaint has been issued and the matter is now set for a hearing.

In addition, the Equal Employment Opportunity Commission has recently proposed "Guidelines on Discrimination Because of Religion." The Commission solicited comments from the General Counsel of the National Labor Relations Board concerning Section 1605.2(c)(4) of those Guidelines. That section had the effect of permitting religious objectors to refrain from paying union dues despite the existence of a union-security clause in the collective bargaining agreement. The General Counsel advised the Equal Employment Opportunity Commission that it had issued a complaint in *Scandia Log Homes, supra.* He pointed out that if the Board itself were to agree with the General Counsel's position, there would be a direct conflict with Section 1605.2(c)(4). The General Counsel's letter is set forth in the Appendix pp. A98-99.

This situation is a direct result of *Burns* and *Anderson.* The questions have arisen before (Cf. *McDaniel* v. *Essex International,* 571 F.2d 338 (6th Cir., 1978). *Scandia Log Homes* demonstrates that, unless this court settles the issue, they will arise again.

The NLRA sought to establish a framework for the resolution of labor disputes. Section 8(a)(3) is an important part of that framework, to which Congress has seen fit to enact only one exception (29

U.S.C. § 169). The Alaska Supreme Court, and the 9th Circuit, by judicially fashioning another exception to section 8(a)(3), have introduced controversy and confusion to an area of labor law which until now had been well settled. The permissible scope of union security agreements should be determined, by this court, as a matter of law, so that needless litigation and uncertainty created by *Wondzell* v. *LPIW* and its predecessors can be halted.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted

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APPENDIX

IN THE SUPEROIR COURT FOR THE
STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

ROBERT A. WONDZELL and ALASKA STATE COMMISSION FOR HUMAN RIGHTS, *Plaintiffs,* vs. ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION & INDUSTRIAL WORKERS LOCAL 2362, *Defendants.*	Civil Action No. 74-422

OPINION

This opinion follows trial of a case involving relationships between the constitutionally guaranteed exercise of religion and a union security agreement between an employer and the union representing all employees in the enterprise.

Lumber Production and Industrial Workers Local 2362 (hereafter "the union") and Alaska Wood Products, Inc. (hereafter "Wood Products") concluded a union shop agreement prohibiting the employment of non-union workmen. Plaintiff Robert A. Wondzell has worked for Wood Products for a substantial period of time but has refused to join the union. Wondzell's refusal is based on his sincere religious beliefs, as a Seventh Day Adventist, which forbid union membership. As a proposed accommoda-

tion with the union, Wondzell has offered to pay an amount equivalent to the union dues to a charity designated by the union. The union's offered accommodation is to accept direct payment of the dues amount, but without requiring actual membership or participation in union activities by Wondzell. The union has threatened to strike if plaintiff is not discharged, and Wood Products has agreed to the discharge. Wondzell has asked for declaratory relief, an injunction to prevent his discharge, and damages.

As grounds for this relief plaintiff claims that the enforcement of the union shop agreement violates his rights under the Federal and the State Constitutions and under state statutes. Both defendants dispute these allegations, and additionally claim that the court lacks jurisdiction of the subject matter.

The jurisdictional question arises from the exclusive primary jurisdiction of the National Labor Relations Board (hereafter NLRB), and if a case is within that jurisdiction, neither state nor federal courts can take primary jurisdiction. Subject to certain exceptions not relevant here, the NLRB has exclusive jurisdiction over situations which are "arguably" subject to Sections 7 or 8 of the National Labor Relations Act, as amended. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 23, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480, 99 L.Ed. 546 (1955).

Section 7 of the N.L.R.A. as amended gives employees the right to engage in concerted activity for mutual aid, or refrain from doing so, subject to the

provision authorizing union shop agreements, 29 U.S.C.A. 157. Section 8(a)(3) of the N.L.R.A. as amended makes it an unfair labor practice for an employer to discriminate in hiring according to union membership, except where, under certain conditions, a union shop agreement has been made. 29 U.S.C.A. 158(a)(3). Section 8(b) of the N.L.R.A. as amended defines unfair practice of labor unions, including coercing employees or employers, but subject to the provision that the union may require periodic dues.

29 U.S.C. 164(b) allows states to pass right-to-work laws, notwithstanding federal approval of union shops:

> "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In *Garmon*, a case involving picketing in order to encourage a union shop, the Supreme Court said:

> "When an activity is arguably subject to § 7 or § 8 of the Act [29 U.S.C. 157 or 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245.

Despite this sweeping language, it is not at all sure that the case before this court is "arguably subject"

to § 7 or § 8 in such a way as to deprive this court of jurisdiction over the dispute. A distinction should be made between those activities which might be unfair labor practices (over which the NLRB should have exclusive primary jurisdiction) and the substantive protection of union shop agreements in 29 U.S.C. 158(a)(3), and, by reference to that section, in 29 U.S.C. 157. The dispute before this court centers on the relationship between state law and the federal constitution and the protection of union shops under federal law. It is the *validity* of the union shop agreement as it pertains to the plaintiff, and not activities designed to lead to such an agreement, or the details of the agreement itself, which are before this court. The NLRB's policy-making role would not be interfered with since the policy which the plaintiff is challenging has already been embodied in the statute by Congress. Furthermore, if the NLRB where (sic) to decide this issue, it would have nothing more to do than delineate the relationship between federal and state law—a function which a state court would be more competent to perform than the NLRB. Furthermore, the plaintiff is not really challenging labor practices as such. He is claiming that those practices, while generally legal, are being used to discriminate against him on the basis of his religion.

In *Vaca* v. *Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967) the Supreme Court stated that:

> ". . . the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the

> administration of national labor policies of concurrent judicial and administrative remedies." 17 L.Ed2d at 852.

In that case the court held breaches of the union's duty of fair representation, currently treated as an unfair labor practice, to be within the court's jurisdiction since "it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts. . . ." 17 L.Ed.2d at 853.

It is probably this lack of expertise which has led three courts to take jurisdiction over challenges from Seventh Day Adventists to compulsory union membership. *Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Papermakers and Paperworkers Union, AFL-CIO*, 462 F.2d 174 (6th Cir. 1972), *cert. den.* 409 U.S. 1028, 93 S. Ct. 464, 34 L.Ed. 2d 322 (1972); *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971), *cert. den.* 404 U.S. 872, 92 S. Ct. 77, 30 L.Ed.2d 116 (1971). None of these decisions discussed the jurisdictional question, but it is apparent that jurisdiction was taken. A recent case in a related area, *Buckley* v. *American Federation of Television and Radio Artists*, 496 F.2d 305 (2d Cir. 1974), did discuss jurisdiction. William F. Buckley claimed that a closed shop violated his First Amendment rights, apparently his right to be employed by the news media. The court held that the issues of compulsory membership and compliance with union regulations were beyond the court's jurisdiction, but that the issue of union dues was not within the NLRB's exclusive jurisdiction.

(The distinction was not explained.) Judge Friendly disagreed on the jurisdictional issues because he felt the thrust of Mr. Buckley's claim was that the NLRA authorized the union to discipline employees and the Act was therefore unconstitutional.

It does seem fairly clear that the courts have jurisdiction to decide constitutional questions, even where the NLRA is involved.

> "The policy behind the pre-emption doctrine is not served by deferring to the Board [the NLRB] where a constitutional question is validly presented. The Board's special expertise in labor controversies does not extend to the interpretation of the Constitution. That field has traditionally been reserved to the courts." *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970).

Constitutional questions were present in the three cases involving Seventh Day Adventists cited earlier —*Yott, Linscott,* and *Hammond.* I would therefore conclude that, despite the sweeping language of *Garmon,* this court has jurisdiction to decide the merits of plaintiffs' claim under the First Amendment of the U. S. Constitution.

Jurisdiction over the claims under state law is a more difficult issue because it tends to become confused with federalism problems, *i.e.*, conflicts between state and federal law. However, again if the issues involved are looked to, this court should have jurisdiction to decide the claims under state law. What must be decided is: (1) is there a conflict between state and federal law; (2) if so, what does the federal

law mean; (3) if not, what does the state law mean. Of these three questions, only the second has the potential for infringing on the NLRB's sphere. If distinction is made between the activities which may be unfair labor practices as construed by the NLRB, and the protection of union shops ennunciated in 29 U.S.C. 158(a)(3), this potential evaporates. This court would not have to define unfair labor practices, or even identify one; it would merely have to say that union shops are protected by federal law and not subject to state anti-discrimination laws. Furthermore, if no conflict were found, the state court and not the NLRB would be the proper body to interpret state law. The situation is similar, though not strictly analogous, to that in *Yott* v. *North American Rockwell Corp., supra.* The court in that case had to decide the relationship between the N.L.R.A. and the federal anti-discrimination law, but there, as here, the N.L.R.A. was relevant only in that it authorized union shops.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed.2d 147 (1974), the Supreme Court decided that an employee who had pursued his contractual remedies under a collective bargaining agreement was not barred from suing because of discrimination under Title VII of the Civil Rights Act of 1964. While the case is not analogous to the one before this court, the Supreme Court did elucidate the relationship between Title VII and the N.L.R.A. by quoting an interpretive memorandum prepared by one of the sponsors of the Civil Rights Act:

"If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board [sic] would not be deprived of jurisdiction." Senator Joseph Clark, 110 CONG. REC. 7202 (1964), *quoted* at 39 L.Ed.2d 158, footnote 9.

In cases more germane to the one before this court, two federal courts have held that the N.L.R.A. did not preempt the jurisdiction of courts over discrimination cases involving labor:

"Insofar as this Court in this action is concerned, the U's [Union's] referral system is countenanced by subsection (f) of the National Labor Relations Act, 29 U.S.C. § 158(f). Whether it does or does not comply with the permissions of that section is not a matter for this court in this case, but is within the jurisdiction of the N.L.R.B. Whether the referral system, as presently in effect, complies with the requirements of Title VII is a question within the jurisdiction of this Court in this action. There is nothing preempting that problem to the N.L.R.B." [citations omitted]. *Dobbins* v. *Local 212, International Brotherhood,* 292 F. Supp. 413 at 447 (S.D. Ohio 1968).

"By enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et. seq.*, Congress demonstrated its clear intention that problems of racial discrimination in employment were not within the exclusive jurisdiction of the National Labor Relations Board." *U. S.* v. *Georgia Power Co.*, 301 F. Supp. 538 at 542 (N.D. Ga. 1969).

It could be said that the jurisdiction granted to the

federal courts over discrimination in employment is a specific exception to the NLRB's exclusive jurisdiction, and does not therefore indicate that *states* have jurisdiction over discrimination in labor practices. However, I tend to agree with the court in *U. S.* v. *Georgia Power Co., supra* that the passage of the Civil Rights Act of 1964 indicates that Congress did not intend to give the NLRB exclusive jurisdiction over discrimination whenever labor was involved. It is difficult to see how the NLRB's expertise in labor relations would make it better able to decide what constitutes discrimination.

Therefore while Sections 7 and 8 of the N.L.R.A. as amended (29 U.S. 157 and 158) may be relevant to this case, this court is more competent to deal with the issues raised by the state claims than the NLRB. The impact on labor administration policies would also be insignificant, since state law will not be relevant unless it is found that there is no conflict between the N.L.R.A. and state law.

The plaintiff has also suggested that there is no jurisdictional problem because a state has the right to enforce its own laws regulating union security agreements. This is highly doubtful. States do have the right to enforce laws *prohibiting* union security agreements made pursuant to 29 U.S.C. 164(b). *Retail Clerks International Assn.* v. *Schmerberhorn*, 375 U.S. 96, 84 S. Ct. 219, 11 L.Ed.2d 179 (1963) (Schmerberhorn II). It is not clear, however, that 29 U.S.C. 164(b) allows states to make laws regulating such agreements, without *prohibiting* them. One state

court decided that a state agency had no jurisdiction to enforce a state law paralleling the federal law. *Building Construction Trades Council, AF of L* v. *American Builders, Inc.*, 139 Colo. 236, 337 P.2d 953 (1959). A commentator has disagreed, maintaining that § 14(b) allowed the states to *regulate* union security agreements. Smith, "The Taft-Hartley Act and State Jurisdiction Over Labor Relations," 46 MICH. L. REV. 593 (1948). Even Professor Smith, however, seems to contemplate state legislation which deals directly with labor relations. Since the state constitutional issues raised by the plaintiff are not specifically directed to either unions or management and since the state statutes concern management and unions only insofar as they engage in discriminatory practices, it is difficult to see either of them as "labor legislation." I do not think therefore that this court could have jurisdiction over the state claims under the *Schmerberhorn rule*. Jurisdiction over these claims can be better justified by the view that the function of the NLRB is not disturbed by a state court's deciding the relationship between state and federal law and, if necessary, the meaning of state law. This court's jurisdiction to decide what is essentially a *federal* question, *i.e.*, the plaintiff claim under the First Amendment of the federal constitution, is even clearer.

For the reasons noted this court reaffirms its earlier determination of jurisdiction over the subject matter involved in this case.

The plaintiff claims that the actions, or threatened

actions, of both defendants infringe his right to free exercise of his religion, guaranteed by the First Amendment of the U. S. Constitution and his rights under the Fourteenth Amendment.

Four federal courts have decided cases involving a challenge by Seventh Day Adventists to union shop agreements as violative of their First Amendment right to free exercise of their religion. All have decided that governmental interest in union peace outweighed the slight infringement of a person's right to free exercise of his religion. *Yott* v. *North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Hammond* v. *United Papermakers and Paperworkers Union, AFL-CIO*, 462 F.2d 174 (6th Cir. 1972), *cert. den.*, 409 U.S. 1028, 93 S. Ct. 464, 34 L.Ed.2d 322 (1972); *Linscott* v *Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971), *cert. den.* 404 U.S. 872, 92 S Ct. 77, 30 L.Ed2d 116 (1971); *Gray* v. *Gulf Mobile and Ohio Railroad Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. den.* 400 U.S. 1001, 91 S. Ct. 461, 27 L.Ed.2d 451 (1971).

The first issue that must be decided is whether governmental action necessary to bring the First Amendment into play is present. The fullest discussion of this issue is in *Linscott* v. *Millers Falls Co.*, *supra*. The court believed that, despite the states' ability to pass right-to-work laws, Sections 7 and 8 of the N.L.R.A. as amended, 29 U.S.C. § 157 and 158, placed a federal *imprimatur* on union shop agreements. Judge Coffin disagreed in *Linscott*, and in *Buckley* v. *American Federation of Television and*

radio Artists, 496 F.2d 305 (2d Cir. 1974), the majority simply assumed governmental action for the sake of argument, and decided that the plaintiff's free speech claims were outweighed by governmental interests. In my opinion 29 U.S.C. § 158(a)(3) does not guarantee the right to a union shop if certain conditions are met, and the fact that a state may abridge that right does not lessen the federal government's action.

The method which each court used was to balance the government interest in industrial peace against the harm to the plaintiff. Each court found that the government had a compelling interest which overrode the infringement on the plaintiff's free exercise of his religion.

However in both *Linscott* and *Yott* the courts noted that the plaintiffs did have an alternative, *i.e.*, non-union shop employment. There is some indication that the plaintiff wishes to distinguish these cases from the one before this court on the basis that the plaintiff may not be able to obtain non-union employment sufficient to support himself in the area in which he lives. While the plaintiff's lack of alternatives may reveal some weakness in the "balancing test" as applied to the First Amendment, I do not believe that *Yott* can be distinguished on that basis.

The court's remark in *Yott* may have been a way of distinguishing that situation from the one in *Sherbert* v. *Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed.2d 965 (1963).. In *Sherbert* a Seventh Day Adventist was denied unemployment benefits because

she would not take employment on Saturday and was not therefore "available for work." As pointed out in *Yott*, the plaintiff's alternative in *Sherbert* was destitution. Nevertheless, the decision on *Sherbert* clearly was grounded on the idea that the state's interest in denying compensation was not sufficient to override the plaintiff's right to free exercise of her religion. The Supreme Court also focused on the state's interest in an earlier case, *Braufeld* v. *Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L.Ed.2d 563 (1961), in which an Orthodox Jew challenged Pennsylvania's closing laws. The court found the state's interest — what an outraged Justice Brennan termed "the mere convenience of having everyone rest on the same day" —was sufficient to uphold the law. Justice Stewart, dissenting with Justice Brennan observed:

> "Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. This is a cruel choice." *Braufeld* v. *Brown*, 6 L.Ed.2d at 574.

This rather frank statement may impel courts to consider a plaintiff's alternatives, but it does not change the fact it is the state's interest not the *particular* plaintiff's alternatives, upon which the Supreme Court has focused its attention. In *Braufeld*, for instance, the court noted that its decisions would not affect all Orthodox Jews, but only those who felt it necessary to work on Sunday. *Braufeld* v. *Brown*, 6 L.Ed.2d at 658. By analogy one might also say that a union shop agreement will not deprive all Seventh Day Adventists of work, but only those who choose

to live in areas where no non-union employment is available. In short, if the governmental interest is compelling enough, the position of a *particular* plaintiff will not invalidate the governmental action.

On the authorities noted I am persuaded that a compelling governmental interest is involved, and that it must prevail over plaintiff's right to the free exercise of his religious beliefs unless a reasonable accommodation can be found without undue hardship. Defendant union has offered such an accommodation in allowing plaintiff not to become a member of the union, so long as he pays to the union an amount equivalent to the union dues. In my view anything less than this would cause an undue hardship on the union, for unless each employee pays his fair share of the cost of collective bargaining under the union shop agreement, the capacity of the union to carry out its bargaining function is necessarily diminished. Plaintiff should have no right to avoid meeting that share, since it is clear he reaps the full benefits of the bargaining results.

It is therefore my conclusion that plaintiff's rights must yield to those assured under the guarantee of the union shop. Counsel for defendant union will submit findings, conclusions and a form of judgment accordingly.

DATED: October 15, 1975.

Thomas B. Stewart
Presiding Judge

CERTIFICATION

The undersigned certifies that on the 15th day of October, 1975, a true copy of this document was served on the following attorneys: Robert Wagstaff, William B. Rosell, M. T. Thomas, Allen F. Compton, Mike Stalk.

(By Sharon Brockway.)

THE SUPREME COURT
OF THE STATE OF ALASKA

ROBERT A. WONDZELL and the ALASKA STATE COMMISSION FOR HUMAN RIGHTS, *Appellants,*	)	
v.	)	
ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362, *Appellees.*	)	File No. 2792
	)	OPINION
ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362, *Cross-Appellants,*	)	[No. 1720 - September 15, 1978]
v.	)	File No. 2804
ROBERT A. WONDZELL and the ALASKA STATE COMMISSION FOR HUMAN RIGHTS, *Cross-Appellees.*	)	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Thomas B. Stewart, Judge.

Before: Broochever, Chief Justice, Rabinowitz, Connor, Burke, and Matthews, Justices

CONNOR, Justice.
BROOCHEVER, Chief Justice, with whom Rabinowitz, Justice, joins, dissenting.

This case brings before us the conflict between a "union shop" agreement and the religious beliefs of a worker whose Seventh-Day Adventist faith forbids affiliation with a labor union. The worker, Robert A. Wondzell, asserts that the union shop agreement violates his rights under state human rights laws and the state and federal constitutions.

The trial court held that Wondzell should pay union dues, but that he need not belong to the union. This satisfied neither side, and cross-appeals have been taken.

Before reaching the merits, we must dispose of jurisdiction and preemption issues. When these appeals were taken a question existed as to whether the National Labor Relations Act precluded state jurisdiction over this case. Our recent opinion in *Bald* v. *RCA Alascom*, 569 P.2d 1328 (Alaska 1977), is dispositive. We there held that the courts of Alaska do have jurisdiction over this type of case. There is no reason to discuss the question further in this opinion.

Robert A. Wondzell was employed as a boiler fireman at the Alaska Wood Products mill in Wrangell. His employment was covered by a union security agreement between Alaska Wood Products (hereinafter AWP or, more commonly, "the employer") and Lumber Production and Industrial Workers Local 2362, an affiliate of the United Brotherhood of Carpenters and Joiners of America (hereinafter "the union"). All persons employed at AWP, except some in job classifications not here at issue, must join the union and pay dues, or be discharged.

Wondzell has been a member of the Seventh-Day

Adventist Church for a number of years. In 1974, he became convinced, in accordance with the tenets of that religion, that he could not conscientiously belong to or financially support a labor union. Hence he resigned from the union and ceased payment of dues. To avoid any personal financial gain, he made a payment equivalent to his union dues ($6.75 per month) to a non-religious charity. Pursuant to the union security agreement, the union directed AWP to dismiss Wondzell from employment.

All parties have stipulated to the nature of Seventh-Day Adventist beliefs on compulsory unionism, and to Wondzell's good faith adherence to those beliefs. Wondzell and others of his faith believe that it is contrary to God's will for them to associate with labor organizations. They cite passages in the Bible which instruct workers to obey their employers, and hence believe that unions stir up labor-management strife which would not exist if workers followed these biblical precepts rather than organizing. They believe that economic coercion, such as strikes and boycotts, is not a proper means to further even the most legitimate and desirable ends. Furthermore, they are concerned that a labor union demands of them loyalty to earthly goals which is contrary to their first loyalty to God.

Paying money to the union without joining it is not an acceptable compromise for Wondzell. Giving financial support to a union, as well as having one's name on its membership rolls, is unacceptable to Adventists.

When the union directed AWP to discharge Wondzell, he filed an action for declaratory, injunctive, and monetary relief. Both the union and the employer were named as defendants. Wondzell sought and was granted a temporary restraining order preventing his dismissal. After a hearing, the superior court denied a preliminary injunction. A petition for review was denied by this court. AWP then dismissed Wondzell from employment.

At the same time, the two defendants moved to dismiss the case, arguing that exclusive subject-matter jurisdiction was in the National Labor Relations Board, and that the National Labor Relations act preempted the state human rights laws. These motions were denied. The union's petition for review on this issue was also denied by this court. Before trial on the merits, the Alaska State Commission on Human Rights was granted permission to intervene as a plaintiff.

At trial, the evidence showed that Wondzell had proposed to make monthly payments to the Multiple Sclerosis Society in lieu of union dues, and to forego all union benefits. The employer was willing to accept this compromise. The union, however, refused to accept it. The union's regional headquarters in Portland, Oregon, instructed the local to strike unless AWP discharged Wondzell. The union was willing to permit Wondzell to resign his membership, so long as he continued to pay the union a sum equivalent to the dues.[1] Because of the strike threat, the employer felt that he had no alternative but to discharge Wondzell.

An official of the Seventh-Day Adventist Church made efforts to mediate the dispute. He found that the employer was receptive but the union was not.

The superior court rendered an opinion holding that (1) the superior court had jurisdiction; (2) Wondzell's constitutional rights had not been violated; (3) AS 18.80.220 imposed upon the union and the employer the duty to make a reasonable accommodation to Wondzell's beliefs; and (4) the accommodation offered by the union—dues payment but not membership—was a reasonable accommodation; anything more favorable to Wondzell would impose undue hardship upon the union and, therefore, was not required by law.

Wondzell and the Alaska State Commission on Human Rights appeal from the second and fourth of these holdings. The employer and the union appeal from the first and third of these holdings.

AS 18.80.220(a)(1) and (2) forbid discrimination on the basis of religion by either employers or labor unions.[2] We have not previously addressed the

[1] The union was willing to assign Wondzell's dues entirely to its contingency fund, used for parties, picnics, and gifts to sick members, so that he would be contributing nothing to bargaining, strikes, or the international union organization. Wondzell testified that his beliefs would forbid even this, because it would "support them [the union] or enhance their image." A church official indicated that such a plan would be contrary to church teachings.

[2] This statute provides in part:

"Sec. 18.80.220. *Unlawful employment practices.*

(a) It is unlawful for

(1) an employer to refuse employment to a person,

question of religious discrimination under AS 18.20.220(a). All parties discuss the case law under the corresponding federal statute, Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000 *et seq.* We have previously noted the similarity between AS 18.20.220 *et seq.* and Title VII of the 1964 federal act. *Loomis Electronic Protection, Inc.* v. *Schaefer*, 549 P.2d 1341 (Alaska 1976).[3] Therefore, we must review the decisional law under the federal statute.

The key words in considering religious discrimination under the federal statute are "reasonably accommodate . . . without undue hardship." 42 U.S.C. § 2000e (j). The federal law, in 42 U.S.C. § 2000e-2, makes it unlawful for an employer or a labor union to discriminate against a person because of that person's religion. Section 2000e (j) provides:

or to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, religion, color or national origin, or because of his age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood;

(2) a labor organization, because of a person's sex, marital status, changes in marital status, pregnancy, parenthood, age, race, religion, color or national origin, to exclude or to expel him from its membership, or to discriminate in any way against one of its members or an employer or an employee;

. . . ."

[3] In Hotel, Motel, Restaurant, Etc. U. Loc. 879 v. Thomas, 551 P.2d 942 (Alaska 1976), we relied upon differences in the procedures specified in the two statutes. There we held that the Alaska law was more favorable to complainants than the federal, in that the Alaska commission had power to file class action administrative complaints even though the analogous federal agency did not.

> "(j) the term 'religion' includes all aspects of religious observance and practice, as well as belief, *unless an employer demonstrates that he is unable to reasonably accommodate* to an employee's or prospective employee's religious observance or practice *without undue hardship* on the conduct of the employer's business." (emphasis added)

Federal case law reads this section as though it said "employer or labor organization" instead of "employer." *Cooper* v. *General Dynamics, Convair Aerospace Div.*, 533 F.2d 163, 171-73, 175 (5th Cir. 1976) (per concurring opinions), *cert. denied sub. nom. Internat'l Assoc. of Machinists and Aerospace Workers, AFL-CIO, et al.* v. *Hopkins*, 433 U.S. 908, 53 L.Ed.2d 1091 (1977); *Hardison* v. *Trans World Airlines, Inc.*, 527 F.2d 33, 42 (8th Cir. 1975), *rev'd* (without mention of this issue) 432 U.S. 63, 53 L.Ed.2d 113 (1977); *Yott* v. *North American Rockwell Corporation*, 501 F.2d 398, 402-03 (9th Cir. 1974).

Section 2000e (j) was enacted in 1972. The original 1964 Civil Rights Act imposed merely a duty not to discriminate; it said nothing about a duty reasonably to accommodate. The federal Equal Employment Opportunity Commission in 1967 imposed the duty to accommodate in its guidelines interpeting the 1964 act. 29 C.F.R. § 1605.1. The federal circuits divided on whether this guideline exceeded the Commission's authority under the 1964 Act. *Compare, e.g., Riley* v. *Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972), and *Yott* v. *North American Rockwell Corporation, supra* (upholding the guidelines), *with Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975), *cert. denied* 429 U.S. 964, 50 L.Ed.2d 333 (1976), and *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970), *aff'd* (by an equally divided court), 402 U.S. 689, 29 L.Ed.2d 267 (1971) (questioning the authority of the E.E.O.C. to adopt the guideline). The Supreme Court later resolved this question by holding that in light of the explicit Congressional adoption of the guideline in 1972, it was "a defensible construction of the pre-1972 statute" and would be applied to cases arising before the 1972 amendment. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 76, 53 L.Ed.2d 113, 126, n. 11 (1977). However, it held that the employer was not required to violate a collective bargaining agreement, otherwise valid, in order to accommodate the employee's particular religious needs. *Id.*, 432 U.S. at 79, 53 L.Ed.2d at 128.

This federal legal development is relevant to the case at bar. AS 18.80.220 *et seq.* was enacted in 1965, modeled on the original 1964 federal act. The Alaska statute has never been amended in line with the 1972 federal amendments; AS 18.80.220 *et seq.* contains no section similar to 42 U.S.C. § 2000e (j). The union argues that AS 18.80.200 *et seq.* does not, therefore, impose a duty of reasonable accommodation. It supports this argument by citing cases from the sixth Circuit and the Illinois Court of Appeals. It is true that the Illinois court reached that conclusion in construing the Illinois statute which, like AS 18.80.200 *et seq.*, paralleled the 1964 but not the 1972 federal

enactment. *Olin Corp.* v. *Fair Employment Practices Com'n of Illinois*, 341 N.E.2d 459 (Ill. App. 1976), *aff'd* 367 N.E.2d 1267 (Ill. 1977) (solely on ground that employer had proved undue hardship.)

The Sixth Circuit cases defy analysis. *Reid* v. *Mempsis Publishing Company*, 521 F.2d 512 (6th Cir. 1975), and *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970), *aff'd* (by an equally divided court), 402 U.S. 689, 29 L.Ed.2d 267 (1971), do hold that there was no duty to accommodate prior to enactment of 42 U.S.C. § 2000e (j). But to the contrary are *Reid* v. *Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972) (a prior appeal of the same *Reid* case); and *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515 (6th Cir. 1975). Judge Edwards wrote an opinion dissenting from the court's refusal to rehear *Reid II en banc* and thereby resolve the conflict, but his colleagues did not join him. *Reid* v. *Memphis Publishing Company*, 525 F.2d 986 (6th Cir. 1975) (Edwards, J., dissenting).

We are persuaded that a duty of reasonable accommodation should be read into the Alaska statute. As the Supreme Court noted in *Trans World Airlines, Inc.* v. *Hardison, supra*, such a duty can be found as a defensible construction of the analogous federal statute.[4] We will now take up the question of whether

[4] We agree with appellant that "reasonable accommodation" and "undue hardship" can be derived from the "business necessity" test of Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed2d 158 (1971), for these verbal formulations are really exemplary of the statute's general purpose of preventing unreasonable discrimination in employment.

the duty to accommodate was met in the case before us.

Many Sabbatarian cases arising under Title VII of the federal act concern an employer who either cannot or will not adjust work schedules so that the employee can avoid work on Saturday. Reasonable accommodation in such cases is a matter of adjusting employee schedules, trading days off, and the like.[5]

The case at bar, however, is more difficult. Even the limited flexibility of changing work schedules is not available when Sabbatarians challenge compulsory unionism. Only three alternative dispositions are presented: (1) the worker must join the union, as must the other workers; (2) the worker need not join the union, but must pay the union an amount equal to the union dues; (3) the worker need make no payments to the union, or have any affiliation with it, financial or otherwise. The union and the employer urge that we should adopt the second alternative, as did the trial court. Wondzell insists that because both the first and second alternatives are contrary to his religious beliefs, only the third alternative would amount to a reasonable accommodation.

We have reviewed the case law on the precise issue of what a reasonable accommodation under these circumstances. In *Yott* v. *North Am. Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977) (on remand from *Yott, supra*), the worker offered three proposals, all of which the court found would be unreasonable:

[5] *See generally* 22 A.L.R. Fed. 580 (1975 & Supp. 1977).

transfer to another job with the same employer not covered by the union contract, exemption of the Sabbatarian from the union security clause, or retention on the job at a lower salary, presumably with the employer paying the union a sum equivalent to the worker's dues. The first of these three alternatives presumably is not available to Wondzell; the union contract covers all of AWP's employees except clerical workers, guards and supervisory personnel. The District Court in *Yott* held that the second of the other possible accommodations would require the union to forego implementation of its statutory right to provide for a "union shop", and that the third would violate the union's duty of fair representation imposed by the National Labor Relations Act.[6]

McDaniel v. *Essex Int'l, Inc.*, 14 FEP Cases 807 (W.D. Mich. 1976), held that in this situation any accommodation is unreasonable because it would work a hardship on the union. The court concluded that the constitutional problems presented and the strong

[6] We recognize that this was merely an alternative holding. The court also held that 42 U.S.C. § 2000e (j), the 'reasonable accommodation/undue hardship" statute, was unconstitutional because it conflicted with the establishment clause of the first amendment. It then discussed the reasonable accommodation issue, in order to avoid the necessity of a remand should the constitutional decision be reversed on appeal.

The basis for the constitutional argument is that a worker with religious scruples against unionism is entitled to accommodation under the statute, but a worker whose political beliefs lead him to equally strong objection to unionism has no such right. The first worker is given an advantage over the second, because of his religion. This constitutional question, not raised in the instant case, was raised but not decided in the United States Supreme Court's recent opinion in Trans World Airlines, Inc. v. Hardison, *supra*.

policy favoring the union shop in federal labor law required a holding in favor of the union.

The decision was reversed in *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338 (6th Cir. 1978), because there was no factual basis in the record for the trial court's conclusions about the undue hardship which would be inflicted upon the union if it accepted the employee's proposal. The case was remanded so that the trial court could receive evidence on the question. The *McDaniel* case is distinguishable from the case at bar, however, because we have before us an adequate evidentiary record to support the court's findings on undue hardship.[7]

Anderson v. *General Dynamics Convair, Etc.*, 430 F. Supp. 418 (S.D. Cal. 1977), relied principally on *Yott, supra*, in holding that any accommodation which did not require payment to the union of a sum equivalent to the dues was unreasonable.

The United States Supreme Court in *Trans World Airlines, supra*, a work schedule case, took a very broad view of "undue hardship" and a correspondingly narrow view of "reasonable accommodation." It held that anything more than a *de minimis* cost to the employer and any interference with collectively-bargained seniority system were undue hard-

[7] Similarly distinguishable from the case at bar is Maine Human Rights Commission v. Local 1361, United Paperworkers International Union AFL-CIO et. al., 383 A.2d 369 (Maine 1978). The court reversed a trial court finding of undue hardship which was rendered without any supporting testimony or other evidence. The appellate court, in reversing, noted that a finding of undue hardship might be warranted following an evidentiary hearing.

ships. The employer was not required, therefore, to yield to Hardison's demands that the seniority system be altered in his favor.

In the case at bar, the union is concerned principally with the "free rider" problem. The union or agency shop[8] is the quid pro quo which the union exacts from the workers in exchange for the bargaining strength which collective organization provides. There is strength in numbers. That is one of the principles underlying collective bargaining and the National Labor Relations Act.[9] Collective bargaining in an open shop would permit free riders: negotiated wages and benefits would go equally to the employees who financially supported the bargaining agent and to those who did not.[10]

Wondzell argues that he would not be a free rider under his proposed accommodation. He would make a

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[8] The parties recognize that the difference between the union shop — compulsory union membership — and the agency shop — compulsory payment of dues to the union, with or without membership — is irrelevant to this case. Wondzell's objection is to contributing money to the union, whether or not his name is on the rolls. The union is offering Wondzell the equivalent of the "agency shop."

[9] The interest in the union shop is not merely the interest of the union. The National Labor Relations Act expresses a strong public and governmental policy in favor of collective bargaining as a means to industrial peace, and the union shop as a tool to increase the effectiveness and fairness of collective bargaining. *See* 29 U.S.C.A. § 151, 158(a) (1973); Linscott v. Millers Falls Company, 440 F.2d 14, 17-18 (1st Cir. 1971), *cert. denied*, 404 U.S. 872, 30 L.Ed.2d 116 (1971).

[10] In exchange for governmental protection as exclusive bargaining agent, a union must fairly and equitably represent all the workers in the bargaining unit, union and non-union. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 89 L.Ed. 174 (1944).

monthly payment to a non-religious, non-labor charity, the Multiple Sclerosis Society. He was willing to let the union select a recipient of his charitable gifts. He would accept cost of living increases but not other union-negotiated pay increases. He intended to continue to take advantage of employer-paid fringe benefits, including medical insurance, pension, vacation, and holidays, even if they were union negotiated.[11] He acknowledged that the union had helped him arrange a work schedule which assured that he would not be required to work on the Sabbath.

The union presents an opposing argument. While the $6.75 per month in union dues would not enrich Wondzell under his proposal, it would not benefit the union. Making Wondzell's proposed accommodation would decrease the union's revenues to service a bargaining unit unchanged in size. The union is also afraid that other workers motivated by nonreligious conscientious objections to unionism.[12] or by lucre rather than conscience might seek to be exempted from payments.

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[11] Elder W. Melvin Adams, a national official of the Seventh-Day Adventist church, testified that this would be in accord with church teachings.

[12] In order to avoid the danger of unconstitutionality we would interpret AS 18.80.220 to accord the same privileges to all sincere conscientious beliefs, whether or not they are accompanied by a belief in a supreme being. *See* Yott 1. North American Rockwell Corp., 428 F.2d 763 (C.D. Calif. 1977); United States v. Seeger, 380 U.S. 163, 176, 13 L.Ed.2d 733, 743 (1965):

> "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."

The question before us is painful to resolve. As we noted earlier, only three alternatives were presented. The one selected by the trial court was the only real "accommodation" in the sense that it represented a compromise. The other two alternatives did not. The trial court stated its conclusion in these terms.

> "Defendant union has offered . . . accommodation in allowing plaintiff not to become a member of the union, so long as he pays to the union an amount equivalent to the union dues. In my view anything less than this would cause an undue hardship on the union, for unless each employee pays his fair share of the cost of collective bargaining under the union shop agreement, the capacity of the union to carry out its bargaining functions is necessarily diminished. Plaintiff should have no right to avoid meeting that share, since it is clear he reaps the full benefits of the bargaining results.
>
> It is therefore my conclusion that plaintiff's rights must yield to those assured under the guarantee of the union shop."[13]

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[13] Wondzell argues that to the extent the quoted passage contains findings of fact, they are unsupported by the evidence and are therefore clearly erroneous. (Alaska R. Civ. P. 52(a) The evidence clearly supports the conclusion that if Wondzell prevailed, the union would have fewer dollars with which to serve its bargaining unit, Wondzell's argument is that the sum which would be lost to the union is *de minimis*.

The Tenth Circuit has held that "reasonable accommodation" and "undue hardship" raise questions of fact, to be tested on appeal by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). United States v. City of Albuquerque, 545 F.2d 110 (10th Cir. 1976); Williams v. Southern U. Gas Co., 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 429 U.S. 959, 50 L.Ed.2d 325 (1976).

We are convinced that the trial court ruled correctly.[14] It is apparent that the court selected the only practical alternative of those presented. Any accommodation beyond that would impose an undue hardship upon the employer or the union. Under the principles set forth in *Trans World Airlines, Inc.* v. *Hardison, supra*, the employer and the union cannot be asked to do more.

Because we find no error in the determination made by the trial court, we must affirm the judgment.[15]

AFFIRMED.

BOOCHEVER, Chief Justice, with whom RABINOWITZ, Justice, joins, dissenting in part.

While I agree with most of the opinion, I am not convinced that a sufficient effort was made to comply with the duty to accommodate. In *Yott* v. *North American Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977), under similar circumstances, the worker offered to receive a salary reduced by the amount of dues he would otherwise pay to the union. It would

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[14] We do not imply that additional union accommodation may not be feasible. We note that the union did offer to have Wondzell's dues applied solely to its contingency fund used for parties, pictures and gifts to sick members so that he would not be contributing to bargaining, strikes or the international union organization. There is still the possibility of other accommodations.

[15] In view of our disposition it is not necessary to review Wondzell's claim that the Alaskan Constitution requires that a right to reasonable accommodation of one's religious beliefs must be recognized, for we have found such a right to be within the ambit of our statutory law.

then be left to the union and the employer to determine whether additional payments equivalent to the union dues would be paid by the employer to the union. I agree with the statement in *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338, 344 (6th Cir. 1978), that the legislation requires a balancing between the religious needs of the individual and the legitimate business needs of both the employer and the union. I also am mindful of the considerations eloquently expressed by Justice Marshall in his dissent in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 96-97, 53 L. Ed. 2d 113, 139 (1971):

> What makes this case most tragic, however, is not that respondent Hardison has been needlessly deprived of his livelihood simply because he chose to follow the dictates of his conscience. Nor is the tragedy of the case exhausted by the impact it will have on thousands of Americans like Hardison who could be forced to live on welfare as the price they must pay for worshipping their God. The ultimate tragedy is that despite Congress' best efforts, one of this Nation's pillars of strength—our hospitality to religious diversity—has been seriously eroded. (footnote omitted)

I am not convinced that suitable effort has been made to explore all alternatives in this case before reaching the drastic result of depriving Wondzell of his employment.

ROBERT A. WONDZELL, *Appellant,* v. ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362, *Appellees.*	File No. 2792 / File No. 2804
ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362, *Cross-Appellants,* v. ROBERT A. WONDZELL and the ALASKA STATE COMMISSION FOR HUMAN RIGHTS, *Cross-Appellees.*	OPINION ON RE-HEARING [No. 1720 - June 1,1979]

Appeals from the Superior Court of the State of Alaska, First Judicial District, Juneau, Thomas B. Stewart, Judge.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Burke, and Matthews, Justices.

MATTHEWS, Justice.

CONNOR, Justice, dissenting.

In our prior opinion in this case, 593 P.2d 860 (1978), we concluded that the reasonable accommodation of a worker's religious beliefs implicitly required by AS 18.80.220(a),[1] does not require a union to allow a worker to pay an amount equivalent to union dues to

[1] Text set forth 583 P.2d at 862 n. 2.

a charity selected by the union. We relied on two cases in point, *Yott* v. *North American Rockwell Corp.*, 428 F. Supp. 763 (C.D. Cal. 1977), and *Anderson* v. *General Dynamics Convair Aerospace Division*, 430 F. Supp. 418 (S.D. Cal. 1977), and distinguished cases reaching the opposite result such as *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338 (6th Cir. 1978), and *Maine Human Rights Commission* v. *Local* 1361, *United Paperworkers International Union*, 383 A.2d 368 (Maine 1978). *Anderson* and *Yott* relied on the strong suggestion in the prior Ninth Circuit Court of Appeals opinion, *Yott* v. *North American Rockwell*, 501 F.2d 398, 402, 403 nn. 6 and 7 (1974), that it would be undue hardship to preclude a union from receiving dues from a worker resisting payment on religious grounds.

On petition for rehearing Wondzell has pointed out that one week prior to publication of our decision, the Ninth Circuit Court of Appeals overruled *Anderson* and issued an opinion in a companion case holding that substitute payments to a charitable organization in lieu of union dues are not *per se* an undue hardship on a union and they therefore may be required under the duty of reasonable accommodation. *Anderson* v. *General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978); *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978). Neither of the cases on which we relied is now good law. We are aware of no other case involving similar facts which supports our prior opinion.

Anderson and Burns are particularly important to this case for several reasons. First, the state law duty to accommodate is potentially governed by a federal law limitation contained in the National Labor Relations Act, 29 U.S.C. §§ 158-159, which authorizes a union shop and allows the discharge of an employee who does not pay union dues. No state law result which contravened the prevailing federal court interpretation of these sections of the National Labor Relations Act could long survive. An action for declaratory judgment in federal court would insure that the court of appeals' interpretation would prevail. However, no such result is now in the offing because the court of appeals in *Anderson*, while recognizing the conflict between the National Labor Relations Act and the Civil Rights Act of 1964, has determined that the former does not preclude a plan of substitute payment to charity. 589 F.2d at 400-401.

Second, our prior decision permits conduct now prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[2] Thus the decision will be of no practical effect in the broad range of cases where there is overlapping federal and state jurisdiction. Further, we have repeatedly recognized that AS 18.80.220(a) is not only "modeled on" the federal law, thus making federal case law relevant, *Wondzell*, 583 P.2d at 863, but is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination. *Hotel Employees Local* 879 v. *Thomas*, 551 P.2d 924, 946, 947 (Alaska 1976);

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[2] Discussed in our prior opinion, 583 P.2d at 863-865.

Loomis Electronic Protection, Inc. v. *Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976). "In view of the strong statement of purpose in enacting AS 18.80. 200," and our legislature's intent "to put as many 'teeth' into the statute as possible," *McLean* v. *State*, 583 P.2d 867, 869 (Alaska 1978); *Loomis*, 549 P.2d at 1343, it would be anomalous to interpret state law as not requiring accommodation by a labor union, when in many instances that same accommodation could now be compelled by an employee invoking the proper procedures under 42 U.S.C. § 2000e.

In view of the decisions of the court of appeals in *Anderson* and *Burns* we vacate the result reached in our prior opinion. The question remains whether a remand on the undue hardship to the union is necessary. The burden of proving undue hardship lies with the union and the employer. *Anderson*, 589 F.2d at 401-02; *Burns*, 589 F.2d at 405. The record reveals no employee other than Wondzell who is subject to the local's jurisdiction and who shares Wondzell's theological anti-union beliefs. Since union dues are only $6.75 per month, the hardship to the union cannot be regarded as undue. If, at some future time, the union experiences a wide-spread refusal to pay dues based on professional religious beliefs, undue hardship may be established. *See Burns*, 589 F.2d at 407.

REVERSED AND REMANDED for further proceedings consistent with the views herein expressed.

[Justice Connor dissents, and will file a dissenting opinion at a later time.]

THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT A. WONDZELL,
Appellant,
v.
ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362,
Appellees.
ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362,
Cross-Appellants,
v.
ROBERT A. WONDZELL and the ALASKA STATE COMMISSION FOR HUMAN RIGHTS,
Cross-Appellees.

No. 2792

AMENDED MANDATE

File No. 2804

To: The Superior Court of the State of Alaska, First Judicial District at Juneau.

Robert A. Wondzell filed an appeal from a judgment of the Superior Court, First Judicial District at Juneau, in Civil Action No. 74-422 entitled, "ROBERT A. WONDZELL and THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS, Plaintiffs, vs. ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION & INDUSTRIAL WORKERS LOCAL 2362, Defendants." Alaska Wood Products, Inc., and Lumber Production and Industrial Workers Local 2362 filed a cross-appeal from the same judg-

ment. The cases were heard on November 4, 1977. On September 15, 1978, the court filed its written opinion. On June 1, 1978, the court filed its written opinion on rehearing.

IT IS ORDERED:

1. The judgment of the Superior Court entered on January 8, 1976, is reversed and the case is remanded for further proceedings consistent with the opinion on rehearing dated June 1, 1979.

2. Appellant Robert Wondzell shall recover from appellee costs and attorney's fees as shown below.

Costs and Attorneys Fees:	
Filing Fee	$ 50.00
Duplicating Appellant's Brief	285.00
Duplicating Reply/Cross-Appellee's Brief	215.00
Transcript Costs	558.25
Attorney's Fees	500.00
Total	$1,608.25

WITNESS the Honorable Jay A. Rabinowitz, Chief Justice of the Supreme Court, State of Alaska, this 4th day of June, 1979.

Clerk of the Supreme Court

Connie Staska
Chief Deputy Clerk

[SEAL]

THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT A. WONDZELL, *Appellant,* v. ALASKA WOOD PRODUCTS, INC., and LUMBER PRODUCTION AND INDUSTRIAL WORKERS LOCAL 2362, *Appellees.*	File No. 2792
ALASKA WOOD PRODUCTS, INC., and LUMBER, PRODUCTION and INDUSTRIAL WORKERS LOCAL 2362, *Cross-Appellants,* v. ROBERT A. WONDZELL and THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS, *Cross-Appellees.*	File No. 2804

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that LUMBER, PRODUCTION AND INDUSTRIAL WORKERS, LOCAL 2362 hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Alaska (rendered on rehearing), reversing the decision of the trial court, entered in this action on June 4, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 11th day of July, 1979.

JOLLES, SOKOL & BERNSTEIN, P.C.

Bernard Jolles

Of Attorneys for Appellant
Local 2362, LPIW

Duane Terrell BURNS,
Plaintiff-Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION CO.
et al., Defendants-Appellees.

No. 76-1188.

United States Court of Appeals,
Ninth Circuit.

Sept. 7, 1978.

Certiorari Denied Jan. 8, 1979.
See 99 S.Ct. 843.

Railroad employee brought civil rights action seeking to enjoin his employer and union for discharging him for refusing to pay union dues and assessments in violation of his religious beliefs. The United States District Court for the District of Arizona, James A. Walsh, J., held that the union and the employer had fulfilled their statutory duties of accommodation, and the employee appealed. The Court of Appeals, Hufstedler, Circuit Judge, held that: (1) the employee met burden to prove a prima facie case of religious discrimination when he proved that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his church and that he was threatened with discharge for refusing to pay union dues and assessments; (2) the employer and the union did not meet their burden to

prove either that they had made good faith efforts reasonably to accommodate the employee's religious belief or that no accommodation reasonably could be made without undue hardship; (3) the loss of the employee's $19 per month in union dues was de minimis and did not establish that the union would suffer substantial financial hardship if the employee were permitted to pay the equivalent of union dues and assessments to a charitable fund; (4) the evidence did not establish that administrative difficulties in accommodating the employee's religious beliefs would cause undue hardship, and (5) the section of the Railway Labor Act which authorizes union security agreements was constitutional.

Affirmed in part, reversed in part and remanded.

1. Civil Rights 13.12(1)

Where railroad employee established that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his religion and that he had been threatened with discharge for his refusal to pay union dues and assessments, the employee proved a prima facie case of religious discrimination in violation of Title VII of the Civil Rights Act and the burden was thereafter on the employer and the union to prove that they made good faith efforts to accommodate the employee's religious beliefs, that the effors were unsuccessful and that the employer and the union were unable reasonably to accommodate those beliefs without undue hardship. Civil Rights Act of 1964, § 701(j) as amended 42 U.S.C.A. ; 2000e(j).

2. Civil Rights 9.10

Under the Civil Rights Act of 1964, an employer is required to take some steps in negotiating with an employee to reach a reasonable accommodation to an employee's religious belief. Civil Rights Act of 1964, § 701(j) as amended 42 U.S.C.A. § 2000e(j).

3. Civil Rights 9.10

Under the Civil Rights Act, if an employer has made more than a negligible effort to accommodate an employee's religious needs and the employee views the employer's effort as inadequate, the question becomes whether further accommodation sought by the employee would constitute undue hardship. Civil Rights Act of 1964, § 701(j) as amended 42 U.S.C.A. § 2000e(j).

4. Civil Rights 9.11

For purpose of determining whether employer and union established that accommodation to employee's religious beliefs would give rise to "undue hardship," proof that some fellow-workers would grumble or be unhappy with a particular accommodation to the employee's religious beliefs was not sufficient to establish "undue hardship"; an employer or union would have to show actual imposition on co-workers or disruption of the work routine in order to show "undue hardship." Civil Rights Act of 1964, § 701(j) as amended 42 U.S.C.A. § 2000e(j).

5. Civil Rights 9.11

Loss to union of $19 per month in union dues was de minimis and such loss did not establish that union would suffer substantial financial hardship if employee who objected to payment of union dues on religious grounds were permitted to pay the equivalent of union dues and assessments to a charitable fund. Civil Rights Act of 1964, § 701(j) as amended 42 U.S.C.A. § 2000e(j).

6. Civil Rights 9.11

In absence of any evidence on the point, apart from testimony that keeping track of employee's charitable contributions would entail some bookkeeping, union did not establish that "undue hardship" would result from administrative difficulties in accommodating employee's bona fide belief that union membership and payment of union dues were contrary to the teachings of his church by permitting the employee to pay the equivalent of union dues and assessments to a charitable fund. Civil Rights Act of 1964, § 701(j) as amended 42 U.S.C.A. § 2000e(j).

7. Labor Relations 43

The section of the Railway Labor Act which permits union security agreements is constitutional. Railway Labor Act, §§ 1 et seq., 2, subd. 11, 45 U.S.C.A. § 151 et seq., 152, subd. 11.

David Watkins (argued), Washington, D. C., for plaintiff-appellant.

Clarence M. Small, Jr. (argued), John A. Robertson (argued), Birmingham, Ala., for defendants-appellees.

Lutz Alexander Prager (argued), Washington, D. C., for Equal Employment Opportunity Commission, amicus curiae.

Appeal from the United States District Court for the District of Arizona.

Before HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge.

Burns brought this Title VII action seeking to enjoin his employer, Southern Pacific Transportation Company ("Company") and the United Transportation Union and its local ("Union") from discharging him for his refusal to pay union dues and assessments in violation of his sincerely-held religious beliefs. The district court held that the Union and the Company had fulfilled their statutory duties of accommodation required by the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e *et seq.*, particularly § 2000e(j) (1970 Supp. 2)) when they offered to relieve Burns of his obligation to belong to the Union and that no further accommodation was required because payment of the dues-equivalent to a charity worked an undue hardship upon the Union and its members by

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* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

relieving Burns of paying his fair share of union expenses. The district court also rejected Burns' attack upon the constitutionality of the application to him of § 2, *Eleventh* of the Railway Labor Act, 45 U.S.C. § 152, *Eleventh* (1970). We reverse in part, holding that the Company and the Union failed to carry their burden of proving good faith efforts reasonably to accommodate Burns' religious beliefs and their further burden of proving that no accommodation reasonably could be made without undue hardship to the Union or the Company. We affirm the district court's rejection of Burns' constitutional claim.

Burns has been employed by the Company since 1955; he is classified as a brakeman and conductor. For many years he has been a member of the Seventh Day Adventist Church. He withdrew from the Union on February 26, 1974, when he became aware that his affiliation with the Union and his payment of dues to the Union were in direct conflict with the teachings of his Church. The district court found on ample evidence that Burns has a sincere religious belief in the teachings of his Church forbidding membership in labor organizations and contributions to such organizations. He requested an informal accommodation to his religious beliefs and asked to meet personally with representatives of the Union and the Company. He has offered to pay the equivalent of union dues and assessments to a designated charity and to offer proof to the Union of such charity payments. The Union and the Company were willing to waive any requirement of membership in the Union and participation in union activities, but both declined to consider any accommodation which would involve Burns' not paying union dues and assessments.

Upon refusal by the Union and the Company to consider any accommodation in respect of dues and in anticipation of his discharge, Burns filed charges of religious discrimination with the Equal Employment Opportunity Commission in Arizona. Thereafter, he obtained a right-to-sue letter, and he filed his complaint in the district court on March 1, 1974. The original complaint sought injunctive relief, attorney's fees, and damages. After the Company and the Union agreed that Burns could continue to work while the litigation was pending, the complaint was amended to seek only injunctive relief from discharge and attorney's fees. The case was tried by the court without a jury, resulting in judgment against him, and Burns appeals.

At all material times the Company and the Union have had in effect a Union security agreement requiring all employees, as a condition of employment, to be members in good standing of the Union. A companion agreement between the predecessor of the Union and the Company contained a provision which gives some relief to religious objectors by stating that an employee having religious scruples against joining a union "will . . . be deemed to have met the requirements of the Union Shop Agreement if he agrees to and does pay initiation fees, periodic dues and assessments of the organization representing his craft or class signatory hereto."

[1] Burns fully met his burden of proving a *prima facie* case of religious discrimination in violation of Title VII. He proved that he had a bona fide belief that union membership and the payment of union dues were contrary to the teachings of his Church. He informed his employer and the Union about his religious views. He was thereafter threatened with discharge for his refusal to pay union dues and assessments. (*Anderson* v. *General Dynamics Convair Aerospace Division, supra.*)

[2] We begin our analysis with *Trans World Airlines* v. *Hardison* (1977) 432 U.S. 63, 97 S. Ct. 2264, 53 L.Ed.2d 113. The Court noted there that Congress did not define the degree of accommodation which is required of an employer under section 701 (j) of the Civil Rights Act (432 U.S. at 73-76, 97 S. Ct. 2264), but that the legislative history is at least clear that "Congress intended to require some form of accommodation" and to change prior case law which had condoned an employer who "had not made any effort whatsoever to accommodate the employee's religious needs." (*Id.* at 74, n.9, 97 S.Ct. at 2272.) Thus, the employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. (*Anderson* v. *General Dynamics Convair Aerospace Division, supra*, 589 F.2d at 401; *McDaniel* v. *Essex International, Inc.* (6th Cir. 1978) 571 F.2d 338, 341-42.)

[3] Once the employer has made more than a

negligible effort to accommodate the employee (*Trans World Airlines* v. *Hardison, supra*, 432 U.S. at 77, 97 S.Ct. 2264) and that effort is viewed as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." Once again, this term is not defined by the Civil Rights Act, but the burden of proving undue hardship rests upon the employer or union. The *Hardison* Court *found* that the employer had demonstrated undue hardship where the accommodation requested by the employee (a four-day work week) would have effectively required preferential treatment on the basis of religion for Sabbatarians, causing sacrifices or dislocation in the work schedules of fellow-workers or requiring the employer to hire outsiders to work Saturday shifts at "premium wages." (*Id.* at 81-84, 97 S. Ct. 2264). The Court held that where the impacts upon co-workers or costs are greater than *de minimis*, undue hardship is demonstrated. (*Id.* at 84, 97 S. Ct. 2264.) We now apply the *Hardison* principles to the facts herein.

The Company and the Union made no effort to accommodate Burns' particular religious beliefs. In effect, they informed Burns that his only alternative was to accept the terms of the existing contract which freed him from the obligation of membership if he paid dues to the Union. Burns' religious beliefs, however, forbade payment of dues to the Union. Neither the Company nor the Union attempted to accommodate this belief. Their position therefore is that no accommodation is possible when an employee refuses to

pay union dues and assessments because non-payment of such sums places an undue hardship on the Union as a matter of law or under proof offered in the case.

We rejected the contention that the substitution of payments to a charity for payment of union dues was an undue hardship as a matter of law in the comparison case, *Anderson* v. *General Dynamics Convair Aerospace Division, supra*[1] (*Accord McDaniel* v. *Essex International, Inc., supra*, 571 F.2d 338.) We therefore turn to the examination of the record to decide whether the Union and the Company proved as a matter of fact that substituted payments would create an undue hardship to the Union and Company.

[4] Appellees' hardship case was based in part upon opinions that "free rider" problems could cause serious dissension among employees, resulting in efficiency of operation. These witnesses, however, did not attempt to relate a general sentiment against free riders either to Burns or to a person who, like Burns, made payments equivalent to union dues to a charitable organization. The Union and the Company also argued that, based on unofficial and unscientific polls, employee dissatisfaction with persons who were free riders or who received different treatment of any kind

[1] No difference in result can be based upon the fact that the Union security agreement considered in *Anderson* responded to § 8(a) (3) (b) (2) of the Taft-Hartley Act, 29 U.S.C. § 158(a) (3), (b) (2) (1970) and that the Union security provisions in this case were authorized under the similar provisions of Section 2. *Eleventh* of the Railway Labor Act, 45 U.S.C. § 152. (*McDaniel* v. *Essex Internat'l, Inc.* (6th Cir. 1978) 571 F.2d 338.)

was not hypothetical. We are not persuaded. We agree with the Sixth Circuit, speaking in *Draper* v. *U. S. Pipe & Foundry Co.* (6th Cir. 1976) 527 F.2d 515, 520:

> "We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."

As we noted in *Anderson* v. *General Dynamics Convair Aerospace Division, supra*, undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. (589 F.2d at 402.) An employer or union would have to show, as in *Hardison*, actual imposition on co-workers or disruption of the work routine.

[5] The Union also contends that it would suffer substantial financial hardship if Burns were permitted to pay the equivalent of union dues and assessments to a charitable fund because the costs of collective bargaining would be disproportionately borne by union members and because the administrative costs in keeping track of Burns' charitable contributions would be more than *de minimis*. Excusing Burns from paying his dues to the Union would deprive the Union of $19 per month. The allocation of dues payments was: $7 to the Local, distributed half for salaries and

expenses and the other half to the Local's Committee of Adjustment; $5 to the International Union; $4 to the Union's General Committee of Adjustment; and $3 to the State Legislative Board. There was testimony from one of the Union officers that the loss of Burns' $19 per month dues "wouldn't affect us at all." In our view, the loss of dues to the Union is *de minimis*, even if so necessary to its fiscal well-being that its equivalent would be collected from the Local's 300 members at the rate of 2 cents each per month. The district court did not decide to the contrary as in *Hardison*. (See 432 U.S. at 84, n.15, 97 S. Ct. 2264.) Rather, the district court accepted the Union's contention that accommodating Burns would open the gate to excusing vast numbers of persons who claimed to share Burns' beliefs, thence resulting in a greater than *de minimis* burden on the Union and Union members. The record does not support this speculation. The evidence was that only three persons subject to the Local's jurisdiction were Seventh Day Adventists.[2] If, in the future, the expressed fear of widespread refusal to pay union dues on religious grounds should become a reality, undue hardship

[2] The concern that quantities of religious objectors would deplete the financial resources of the Union is not shared by George Meany, President of the AFL-CIO. A letter from George Meany was introduced into evidence in which Mr. Meany expressed his opinion that religious views such as those of Burns should be accommodated to respect individual religious reservations in the administration of union security agreements and suggesting that an appropriate method of accommodation would be the payment of the equivalent of dues to a union charitable fund or to an agreed upon charity.

could be proved.[3] But on the present record, no substance was given to these apprehensions. (*See McDaniel* v. *Essex International, Inc., supra*, 571 F.2d at 343-44.)

[6] We quickly dismiss the contention that administrative difficulties in accommodating Burns' religious beliefs would caause undue hardship. No evidence was presented on this point, other than testimony that keeping track of Burns' charitable contributions would entail some bookkeeping. No one testified concerning the cost of the minor modifications which would be thereby required, and we cannot say that the modest amount of paper work would impose even *de minimis* cost.

[7] The district court correctly rejected Burns' constitutional challenge to section 2, *Eleventh* of the Railway Labor Act. As Burns necessarily concedes, the constitutional issue has been repeatedly resolved against him. (*E.g., Yott* v. *North American Rockwell Corp.* (9th Cir. 1974) 501 F.2d 398, 403-04.)

For the first time on appeal, the Company has challenged the constitutionality of § 701(j) of the Civil Rights Act, as amended, on the ground that it violates the establishment clause of the First Amendment. We

[3] *See Trans World Airlines* v. *Hardison, supra*, 432 U.S. at 31, 97 S. Ct. 2264 (it would be anomalous to conclude that reasonable accommodation requires actions depriving other employees of their rights), *see also id.* at 90 (Marshall, J., dissenting) ("important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer.").

decline to reach the constitutional question under these circumstances. If the Company is so inclined, it can raise the constitutional question in the district court following remand.

Burns is entitled to a reasonable attorneys' fee as a part of his costs, pursuant to 42 U.S.C. § 2000e-5 (k), the amount of which shall be fixed by the district court on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with the views herein expressed.

David ANDERSON, Plaintiff-Appellant,

v.

GENERAL DYNAMICS CONVAIR AEROSPACE DIVISION, a corporation, and International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50, an association, Defendants-Appellees.

No. 77-2180
United States Court of Appeas,
Ninth Circuit.

Sept. 7, 1978

Rehearing and Rehearing En Banc Denied Jan. 16, 1979.

Employee brought action against former employer and union alleging that he had been discharged in violation of religious discrimination provisions of Title VII of the Civil Rights Act. The United States District Court for the Southern District of California, Robert V. Denney, J., 430 F. Supp. 418, entered judgment for defendants, and plaintiff appealed. The Court of Appeals, Hufstedler, Circuit Judge, held that: (1) employer and union could not excuse their failure to accommodate employee whose religious beliefs prevented him from joining union and paying union dues by pointing to deficiencies, if any, in employee's suggested accommodation that he make an equivalent payment to charity of his choice, and (2)

employee's refusal to pay union dues because of his religious beliefs or equivalent of union dues to union for charity of union's choice and insistence on making equivalent payment to charity of his choice was not an undue hardship relieving employer and union of requirement of accommodating employee's religious beliefs.

Reversed and remanded.

1. Labor Relations 251

Union security agreements are valid under the National Labor Relations Act. National Labor Relations Act, § 8 as amended 29 U.S.C.A. § 158.

2. Civil Rights 13.13(1)

To establish prima facie case of religious discrimination under Title VII of Civil Rights Act, employee had burden of pleading and proving that he had bona fide belief that union membership and payment of union dues were contrary to his religious faith, he informed his employer and union about religious views that were in conflict with union security agreement and he was discharged for refusal to join union and pay union dues. Civil Rights Act of 1964, § 703 (a)(1), (j), 42 U.S.C.A. § 2000e-2(a)(1), (j).

3. Civil Rights 13.13(1)

Upon employee's establishing prima facie case of discrimination by proving he had bona fide belief that union membership and payment of union dues were contrary to his religious faith, he informed employer

and union about religious views that were in conflict with union security agreement and he was discharged for refusal to join union and pay union dues, burden was thereafter upon employer and union to prove that they made good-faith efforts to accommodate employee's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate employee's beliefs without undue hardship. Civil Rights Act of 1964, § 703(a)(1), (j), 42 U.S.C.A. § 2000e-2(a)(1), (j).

4. Civil Rights 9.11

Employer and union could not excuse thehir failure to accommodate employee wo refused to join union and pay union dues because of his religious beliefs by pointing to deficiencies, if any, in employee's suggested accommodation that he make payment equivalent to union dues to charity of his choice. Civil Rights Act of 1964, § 703a)(1), (j), 42 U.S.C.A. § 2000e-2(a)(1), (j).

5. Civil Rights 9.11

Employee's refusal to pay union dues because of his religious beliefs or equivalent of union dues to union for charity of union's choice and insistence on making payment equivalent to union dues to charity of his choice could not be deemed an undue hardship relieving employer and union of requirement of accommodating employee's religious beliefs where there was no evidence proving that union members thought person was "a free rider" if he made equivalent pay-

ment to charity or proving that accommodation of employee would otherwise have been unduly difficult problem for union but employer and union simply relied upon general sentiment against "free riders." Civil Rights Act of 1964, § 703(a)(1), (j), 42 U.S. C.A. § 2000e-2(a)(1), (j).

6. Civil Rights 9.11

Undue hardship relieving employer and union of a duty to accommodate employee's religious beliefs cannot be proven by assumptions or by opinions based on hypothetical facts; even proof that fellow employees would grumble about particular accommodations is not enough to establish undue hardship. Civil Rights Act of 1964, § 703(a)(1), (j), 42 U.S.C.A. § 2000e-2(a)(1), (j).

7. Civil Rights 13.17

Employee who brought successful civil rights action against former employer and union charging that they failed to accommodate his religious beliefs in requiring him to join and contribute to a union was entitled to recover reasonable attorney fees. Civil Rights Act of 1964, § 705(k), 42 U.S.C.A. § 2000e-5(k).

David Watkins (argued), of Jenkins & Watkins, Inc., Dallas, Tex., for plaintiff-appellant.

Ward W. Waddell, Jr. (argued), of San Diego, Cal., for defendants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before HUFSTEDLER and GOODWIN, Circuit Judges, and LUCAS,* District Judge.

HUFSTEDLER, Circuit Judge:

Anderson, a former employee of General Dynamics Convair Aerospace Division ("General Dynamics") brought this Title VII action against General Dynamics and the International Association of Machinists and Aerospace Workers, AFL-CIO, Silvergate District Lodge 50 ("Union"), claiming that he had been discharged in violation of the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e (j)). He sought reinstatement of employment and benefits, an injunction restraining the Union from discriminating against him, back pay and allowances, reasonable attorney's fees, costs and interest. The district court held that no accommodation to Anderson's religious beliefs was possible because his offer to contribute the amount of Union dues to a charity of his choice, rather than to the Union or charities of the Union's choice, imposed an undue hardship on the Union. (*Anderson* v. *General Dynamics Convair Aerospace Division* (S.D. Cal. 1977) 430 F. Supp. 418.)

The critical issue on appeal is whether the Union carried its burden of proving that it could not reason-

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* Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

ably accommodate Anderson's religious convictions without undue hardship on the Union. We conclude that it did not carry its burden of proof.

Anderson was first employed by General Dynamics on October 11, 1956. In 1959, he became a member of the Seventh Day Adventist Church. A tenet of the Church is that its members should not belong to or contribute to labor organizations. Anderson has at all material times held a sincere belief in that tenet. From 1959 until April 3, 1972, the collective bargaining agreement between General Dynamics and the Union did not require General Dynamics to employ only persons who were union members. On April 3, 1972, however, the Union and General Dynamics entered into a collective bargaining agreement, which contained the following provision:

> "Any employee on the Company's active payroll who is in the bargaining unit and is not a member of the Union on 3 April, 1972, shall, as a condition of continued employment in the bargaining unit, join the Union within ten (10) days after the thirtieth (30th) day following the effective date of this agreement, and shall maintain his membership as provided in Paragraph A above."

Anderson did not join the Union within the time limitation provided by the security clause of the bargaining agreement. On May 25, 1972, the Union notified Anderson of his delinquency under the agreement. On June 12, 1972, Anderson informed General Dynamics, which, in turn, informed the Union, that

his religious beliefs prohibited him from joining the Union. Two days later, the Union requested that Anderson be discharged for failure to abide by the provisions of the security clause. On June 19, 1972, General Dynamics discharged Anderson from his employment for the sole reason that he refused to become a member of or contribute to the Union.

The parties stipulated that neither the Union nor General Dynamics offered Anderson any specific alternatives or accommodations with respect to joining the Union, and both the Union and General Dynamics told Anderson that he had to follow the collective bargaining and join the Union. The parties also stipulated that Anderson had made known to his fellow workers, including his shop committeemen, that he would not join the Union and that he would not contribute to the Union, unless he could insure that his contributions went to a recognized charity.

Anderson promptly filed a complaint with the Equal Employment Opportunity Commission, which deferred the matter to the California Fair Employment Practice Commission ("FEPC"). The FEPC referred the case back to the EEOC. After finding reasonable cause to believe that Anderson's discrimination charge was well-founded, the EEOC attempted conciliation. When conciliation failed, EEOC issued a right to sue letter on October 5, 1975. Anderson timely filed a complaint in the district court. The district court rendered judgment against him, and he appeals.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e-2(a) provides in pertinent part as follows:

"It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ."

Similar conduct by a labor organization is also proscribed by the Act. (42 U.S.C. § 2000e-2(c).)[1]

In 1972, Congress enacted 42 U.S.C. § 2000e(j), incorporating the substance of the 1967 EEOC guidelines (29 C.F.R. § 1965.1). The section provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

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[1] Section 2000e-2(c) provides as follows:

"It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

As the Supreme Court has explained, in *Trans World Airlines, Inc.* v. *Hardison* (1977) 432 U.S. 63, 74, 97 S. Ct. 2264, 2271, 53 L. Ed.2d 113. "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer [and also for a union] not to make reasonable accommodation, short of undue hardship, for the religious practices of his employees and prospective employees." Neither Congress nor the EEOC has attempted to spell out any precise guidelines for determining when the "reasonable accommodations" requirement has been met, nor the kinds of circumstances under which a particular accommodation may cause hardship that is "undue." These decisions must be made in the particular factual context of each case because the decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case. (*Redmond* v. *GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 902-03; *Williams* v. *Southern Union Gas Co.* (10th Cir. 1976) 529 F.2d 483, 489. *Cf. Trans World Airlines, Inc.* v. *Hardison, supra*, 432 U.S. at 74-75, 97 S. Ct. 2264.)

[1] We, as well as other courts, have recognized that there is both tension and confict between the legitimate interests of the Union in preserving the benefits of union security agreements, which are valid under the National Labor Relations Act (29 U.S.C. § 158), and the accommodation requirements of Title VII (*e.g., Yott* v. *North American Rockwell Corporation* (9th Cir. 1974) 501 F.2d 398; *McDaniel* v. *Essex Intern'l, Inc.* (6th Cir. 1978) 571 F.2d 338; *Cooper*

v. *General Dynamics, Convair Aerospace Division* (5th Cir. 1976) 533 F.2d 163, 166-69). The balance has been struck, however, in favor of the elimination of discrimination in employment practices and requiring accommodation of religious practices absent proof by the Union, the employer, or both, that reasonable accommodation cannot be made without an undue hardship to the Union or to the employer. (*Trans World Airlines, Inc.* v. *Hardison, supra,* 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed.2d 113; *McDonald* v. *Santa Fe Trail Transportation Co.* (1976) 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed.2d 493; *Franks* v. *Bowman Transportation Co.* (1976) 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed.2d 444.)

[2] To establish a prima facie case of discrimination under §§ 2000e-2(a)(1) & (j), Anderson had the burden of pleading and proving that (1) he had a bona fide belief that union membership and the payment of union dues are contrary to his religious faith;[2] (2) he informed his employer and the Union about his religious views that were in conflict with the Union security agreement; and (3) he was discharged for his refusal to join the Union and to pay union dues. *E.g., Yott* v. *North American Rockwell*

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[2] We have no occasion in this case to determine the breadth of the "beliefs" or "practices" protected by section 2000e(j) or to grapple with bona fides of a particular employee's religious convictions. Both of these facts are conceded for the purpose of this case. We are aware, however, of the Supreme Court's admonition in *Fowler* v. *Rhode Island* (1953) 345 U.S. 67, 70, 73 S. Ct. 526, 527, 97 L.Ed. 828 that "it is no business of courts to say . . . what is a religious practice or activity . . ." *See also Redmond* v. *GAF Corp., supra,* 574 F.2d at 900.

Corp., supra, 501 F.2d 398; *Redmond* v. *GAF Corp., supra,* 574 F.2d at 901.)[3] Both by stipuation of fact and by evidence introduced at trial, Anderson established his prima facie case.

[3] The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship. *Id.* at 902.

Neither the Union nor General Dynamics did anything to accommodate Anderson's religious beliefs. They contend that their failure to take any steps to accommodate is excused because Anderson insisted on making an equivalent payment to a charity of his choice, rather than paying the equivalent fund to the Union for charitable purposes. They rely heavily upon the district court's finding that Anderson's refusal to pay his charitable contribution to the Union was based on his general distrust of unions, rather than on religious beliefs. Finally, they argue that Anderson's suggestion of accommodation would work undue hard-

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[3] We agree with the Seventh Circuit that the employee who has provided his employer with sufficient information to put it on notice of his religious needs is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accommodate his own religious beliefs before he can seek an accommodation from his employer. (*Redmond* v. *GAF Corp., supra,* 574 F.2d at 901-02 ("While we feel plaintiff should be free, even encouraged, to suggest to his employer possible ways of accommodating his religious needs, we see nothing in the statute to support the position that this is part of plaintiff's burden of proof." *Id.* at 901).)

ship as a matter of law because Anderson would become a "free rider."

[4] The burden was upon the appellees, not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation. Thus, Anderson's motivataion in selecting his own charity is irrelevant. Moreover, the district court's findingis contrary to the parties' stipulation of fact that teachings of Anderson's Church forbade making contributions to unions.

[5] Appellees are left with the argument that Anderson's refusal to pay either his union dues or the equivalent of union dues to the Union for a charity of the Union's choice would be an undue hardship as a matter of law because the means of accommodation would create "free riders." The district court accepted this argument; we do not. We follow the Sixth Circuit in *McDaniel* v. *Essex International, Inc., supra*, 571 F.2d 338, with which our case is almost identical.

McDaniel was a Seventh Day Adventist who had a bona fide religious belief that membership in the union and the payment of union dues was a violation of her religion. She requested her employer and the union to make an accommodation to her religious beliefs, and she suggested that she would be willing to contribute an amount equal to the union dues to a nonsectarian charity to be chosen by the union and her

employer. Neither responded to her request, and she was discharged for her failure to adhere to the requirements of the union security agreement. The district court granted summary judgment in favor of the union and the employer, accepting their contentions that the accommodation that the employee suggested would work an undue hardship on the union as a matter of law because non-payment of union dues adversely affected the "financial core" of the union and thus impaired its ability to fulfill its collective bargaining functions. The *McDaniel* court reversed. The court pointed out that the union security provisions of the Taft-Hartley Act (29 U.S.C. § 158(a) (3), (b) (2) (1970)) "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees. [citations omitted]. The burden is on Essex and IAM to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship. The district court found that it would work an undue hardship on IAM to forego the dues payment by the plaintiff. There is no factual basis in the record for this conclusion. In *Draper* v. *U. S. Pipe & Foundry Co., supra* [(6th Cir. 1976) 527 F.2d 515], this court expressed its skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice. 527 F.2d at 520." (571 at 343.)

Here, as in *McDaniel*, neither the Union nor the employer offered any evidence to prove that union

members thought that a person was a free rider if he paid the equivalent of union dues to a charity, nor was there any evidence offered to prove as a fact that the accommodation of Anderson would otherwise have been an unduly difficult problem for the Union. It relied simply upon general sentiment against free riders.

[6] Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship. As the Supreme Court pointed out in *Franks* v. *Bowman, supra,* 424 U.S. at 775, 96 S. Ct. at 1269, *quoting United States* v. *Bethlehem Steel Corp.* (2d Cir. 1971) 446 F.2d 652, 663: " 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.' "[4]

[7] We conclude that the Union and General Dynamics failed to carry their burden of proof, and, ac-

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[4] Appellees can take no comfort from the observation in *Yott* v. *North American Rockwell Corp., supra,* 501 F.2d at 403: "If appellees are able to demonstrate that any suggested accommodation would impose undue hardship on the Union or the employer's business, then *Yott's* discrimination claim should fail." We reversed in *Yott* because the appellees had not demonstrated that the suggested accommodation would impose undue hardship, and, as we have explained the appellees in this case have not done so either.

cordingly, the judgment must be reversed.[5] We also conclude that Anderson is entitled to a reasonable attorney's fee as part of his costs, pursuant to 42 U.S.C. § 2000e-5(k), the amount of which shall be fixed by the district court on remand.

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[5] The appellees attacked the constitutionality of the provisions of Title VII in issue in this case, and they renew that attack, at least obliquely, on appeal. The district court did not reach any constitutional issue, and under these circumstances we also decline to address any constitutional questions.

FORM NLRB-501 (2-67)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 19-CA-10925

Date Filed November 24, 1978

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Scandia Log Homes, Inc.

b. Number of Workers Employed: 8

c. Address of Establishment (Street and number, city, State, and ZIP code): 7303 222nd S.E. Woodinville, WA 98073

d. Employer Representative to Contact: Jens Nielsen; Ken R. Roelofs

e. Phone No.: 485-8185; 885-5225

f. Type of Establishment (Factory, mine, wholesaler, etc.): Factory

g. Identify Principal Product or Service: Pre-fabricated Homes

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about November 22, 1978 and at all times thereafter, the above-named employer, by its officers, agents, and representatives has refused to terminate employees Leon Gottberg, John Drake, Kevin Holsing and Jess Moreno in violation of the Union Security Clause of the Working Agreement between the Lumber Production and Industrial Workers Union, Local 2519, and Scandia Log Homes, Inc. in order to discourage membership in said labor organization.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Lumber, Production and Industrial Workers Union Local 2519

4a. Address (Street and number, city, State, and ZIP code): 2512 2nd Avenue, Seattle, WA 98121

4b. Telephone No.: 623-4980

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

United Brotherhood of Carpenters and Joiners of America, AFL-CIO

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Bob Biringer (Signature of representative or person filing charge) Business Representative (Title, if any)

Address Bob Biringer 2512 2nd Ave. Seattle, WA 98121 623-4980 November 24, 1978

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

UNITED STATES OF AMERICA
BEFORE NATIONAL LABOR RELATIONS BOARD

REGION 19

SCANDIA LOG HOMES, INC. LUMBER, PRODUCTION AND and INDUSTRIAL WORKERS UNION LOCAL 2519, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO	))))))	Case No. 19-CA-10925

COMPLAINT AND NOTICE OF HEARING

It having been charged by Lumber, Production and Industrial Workers Union Local 2519, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, that Scandia Log Homes, Inc., herein called Respondent, has engaged in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the undersigned Regional Director for Region 19, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The Charge was filed by the Union on November 24, 1978 and was served on Respondent by registered mail on or about that date.

2.

(a) Respondent is a state of Washington corporation with office and place of business in Woodinville, Washington, where it is engaged in the business of manufacturing pre-cut homes.

(b) Respondent, during the past twelve months, which period is representative of all times material herein, in the course and conduct of its business operations, had gross sales of goods and services valued at in excess of $50,000.

(c) Respondent, during the past twelve months, which period is representative of all times material herein, in the course and conduct of its business operations, sold and shipped goods or provided services from its facilities within the state of Washington, to customers outside the said state, or sold and shipped goods or provided services to customers within said state, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value of in excess of $50,000.

(d) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4.

At all times material herein, the following named persons occupied the positions set forth opposite their respective names, and have been and are now, agents of Respondent acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act and are agents within the meaning of Section 2(13) of the Act:

Jens Nielson—President

Ken Roelofs—Industrial Relations Representative

5.

(a) The Union is now, and has been at all times material herein, the duly recognized, exclusive bargaining representative of the majority of the employees in the following appropriate unit, herein called the Unit, within the meaning of Section 9(a) and (b) of the Act

> All production and maintenance employees employed by the Employer, excluding all office clericals, guards, supervisors and professional employees as defined by the National Labor Relations Act as amended.

(b) In about June or July 1978 the Respondent and the Union entered into a collective bargaining

agreement (herein the Agreement) covering the terms and conditions of employment for employees in the Unit, which Agreement is in effect from June 1, 1978 through November 30, 1979.

Article II Section (A) through (C3 of the Agreement read as follows:

(A) *Union Membership*

It shall be a condition of employment that all the employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing, and those who are not members on the effective date of this Agreement shall, on or after the thirty-first day following the effective date of this Agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on or after the thirty-first day following the beginning of such employment become and remain members in good standing in the Union.

(B) *Good Standing*

"Good standing" as used herein shall mean that the employee has paid or offered to pay the uniform initiation fees and regular monthly dues uniformly required for membership in the Union.

(C) *Dismissal for Failure to Comply with Article II*

The dismissal of any employee for failure to comply with the provisions of this article shall be on written notice from the Union to the Employer

and employee, setting forth the reason for this delinquent status and allowing 7 days from the receipt of notice to bring his membership into good standing.

6.

(a) On about November 21, 1978, the Union provided the Respondent with a written request for the termination of Leon Gottberg, John Drake and Kevin Holsing and Jess Moreno pursuant to Article II of the Agreement referred to above in subparagraph 5(b).

(b) Sometime between about November 21 and 28, 1978, Respondent terminated Jess Moreno.

(c) Subsequent to November 21, 1978, and continuing to date, the Respondent has refused to terminate Gottberg, Drake and Holsing.

7.

By the acts described above in subparagraph 6(c) and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1)(5) and (d) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 28th day of August, 1979, at 9 a.m., in Room 3064, Federal Building, 915 Second Avenue, Seattle, Washington a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the

right to appear in person, or otherwise and give testimony. The hearing will continue on consecutive days thereafter until concluded. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as amended, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in said Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED at Seattle, Washington, this 16th day of April, 1979.

CHARLES M. HENDERSON

Charles M. Henderson, Regional Director
National Labor Relations Board, Region 19
2948 Federal Building, 915 Second Avenue
Seattle, Washington 98174

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 19

SCANDIA LOG HOMES, INC.	)	
LUMBER, PRODUCTION AND	)	Case No.
and	)	19-CA-
INDUSTRIAL WORKERS UNION	)	10925
LOCAL 2519, UNITED BROTHER-	)	
HOOD OF CARPENTERS AND	)	

MOTION TO TRANSFER CASE TO BOARD AND STIPULATION OF FACTS

A) MOTION TO TRANSFER CASE TO BOARD:

COMES NOW Scandia Log Homes, Incorporated, Respondent; Lumber Production and Industrial Workers Union Local 2519, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, (herein called the Union), Charging Party; and Counsel for the General Counsel, being all the parties to this proceeding, and hereby petition the Board in order to effectuate the purposes of the Act and to avoid any unnecessary costs or delay, to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and to transfer this proceeding to the Board.

The parties agree that the formal papers (Exhibit 1) and the stipulation of facts and exhibits attached

thereto constitute the entire record in this case, and that no oral testimony is necessary or desired by any party. The parties further stipulate that they waive hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's decision; and desire to submit this case for findings of fact and conclusion of law directly to the Board.

In the event the Board grants this motion, and accepts the stipulation of facts herein, the parties request that the Board set a time for the filing of briefs.

STIPULATION OF FACTS

The matter herein initially arose from a charge filed by the Union on November 24, 1978. After investigation of the aforementioned charge, the Regional Director for Region 19 caused a Complaint and Notice of Hearing to be issued on April 16, 1979. The Complaint, as well as Respondent's answer and other formal papers herein are submitted as General Counsel's Exhibit 1(a) through 1(d), and to which the parties offer no objections.

Scandia Log Homees, Inc., (herein called the Respondent), is a state of Washington corporation engaged in the business of manufacturing pre-cut homes in Woodinville, Washington. The Employer employs approximately eight employees at its production facility in Woodinville, Washington.

The charge filed on November 24, 1978[1] by the Union, alleged that since on or about November 22, 1978, and at all times thereafter, the Respondent has refused to terminate employees Leon Gottberg, John Drake, and Kevin Holsing in violation of the union security clause of the collective bargaining contract, (herein called the Contract), between the Union and Respondent, resulting in a violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.

The Union is now and has been since about March 1978 the duly recognized exclusive bargaining representative of the majority of the employees in the following appropriate unit, (herein called the Unit), within the meaning of Section 9(a) and (b) of the Act:

> All production and maintenance employees employed by Scandia Log Homes, Inc., excluding all office clericals, guards, supervisors and professional employees as defined by the National Labor Relations Act as amended.

The unit consists of approximately 8 employees.

During the spring of 1978 the Respondent and the Union engaged in contract negotiations, which negotiations culminated in a contract signed by both parties and which is in effect from June 1, 1978 through

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[1] All dates referred to herein occurred in 1978 unless otherwise noted.

November 30, 1979. That contract contains *inter alia* language providing for a union security clause.[2]

During the course of the contract negotiations in June 1978 and prior to the signing of the contract, Jens Nielson, Respondent's president and owner, stated to the Union that he was planning to hire an individual whose religious beliefs precluded him from joining or in any way supporting the Union. At that time Robert F. Biringer, the union business agent, proposed to Nielson that this new employee could pay the equivalent of his dues to the Union but would be

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[2] Article 2, Sections (A) through (C) of the Agreement read as follows;

(A) *union membership*

It shall be a condition of employment that all the employees of the Employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement shall, on or after the 31st day following the effective date of this Agreement, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on or after the 31st day following the beginning of such employment become and remain members in good standing of the Union.

(B) *good standing*

"Good Standing" as used herein shall mean that the employee has paid or offered to pay the uniform initiation fees and regular monthly dues uniformly required for membership in the Union.

(C) *dismissal for failure to comply with Article* 2

The dismissal of any employee for failure to comply with provisions of this Article shall be written notice from the Union to the Employer and employee, setting forth the reason for this delinquent status and allowing seven days from the receipt of notice to bring his membership into good standing.

relieved of any internal union obligations. Biringer also reconfirmed this offer in writing to the Employer shortly after that meeting.[3]

Leon C. Gottberg, the individual to whom the Respondent had referred during the June contract negotiations, was hired by the Respondent in July 1978. Gottberg, a member of the Seventh Day Adventist Church for approximately 15 years, refused to join the Union because of his religious convictions. As a result of this situation, the Union requested a meeting with the Respondent. On July 14, representatives of the Respondent and the Union met, and as a result of the ensuing discussions the Union again offered to accommodate Gottberg according to its original proposal to the Respondent. Respondent replied that it would se what it could do and another meeting was scheduled.

Sometime in July the Respondent hired a second employee, Kevin Holsing. Holsing, a member of the Weslyan faith, also refused to join the Union because of his personal religious convictions. Throughout the summer of 1978 several meetings were held between the Union and Respondent in an attempt to reach an accommodation for these employees' beliefs. The employees involved did not attend these summer meetings, although they were aware that discussion regarding their situation was going on. Basically, the Union repeatedly offered its original accommodation to the Respondent during these discussions.

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[3] Exhibit 2.

On about September 22, 1979, Respondent hired a third employee, John Drake. Drake, a practicing Seventh Day Adventist for the past five years, also refused to join the Union. Thereupon, another meeting was held on September 25. The three employees — Gottberg, Drake, and Holsing—were present, as well as representatives of the Union and Respondent. At this meeting the Union again offered all three employees its previous proposal as outlined in Exhibit 2. All three individuals refused the offer at that time.

During the month of October, the Union and Respondent met again on at least two occasions in their continuing attempt to reach an ageeable solution to this dilemma. At one of these meetings the Union proposed an alternative accommodation: that in lieu of joining the Union or paying dues, the employees could donate an amount equivalent to dues to the Union's Relief and Contingency Fund.[4] The Respondent was noncommittal to this proposal, but suggested the Union offer it directly to the affected employees. Sometime during October, Union Business Agent Robert Biringer offered this accommodation to Gottberg, who was acting as a spokesperson for the other two employees as well. Gottberg was also noncommittal

[4] According to the Union's by-laws; "This fund may be used for the relief of aged members, organizations, or for any other purpose the Local Union may decide, except to support a dual organization, for partisal politics, religious purposes, or investments in a credit union sponsored by the Local Union, or for any purpose that may be inimical to the interests of the United Brotherhood.

This fund is under the control of the Trustees of Local 2519 subject to vote of the membership."

towards the proposal at this time. However, he did suggest to Biringer that the employees might be willing to pay into a non-profit, non-religious charity an amount equal to their union dues. Biringer stated that the Union could not commit itself on this proposal at that time.

On or about November 7 the Union, the Respondent and the three employees again met. The Union re-submitted its revised accommodation allowing the employees to pay into the Union's Relief and Contingency Fund. All three employees rejected this offer, stating that they could see little difference between paying dues to the Union and paying money into a Union-sponsored fund. Gottberg also requested a copy of the Union's by-laws explaining the purpose of the Fund. The Union in turn requested that each of the three employees provide a letter from his respective church stating the church's position regarding the joining or supporting of labor organizations. All three men subsequently submitted such letters to the Union.

On November 8 the Union sent letters to Gottberg, Drake and Holsing[5] informing them that they had failed to comply with the Union Security clause of the contract or the special accommodation offered them of paying a like amount of dues into the Union's Relief and Contingency Fund. The Union further informed the men of the amount of money due the Union as well as the probability of dismissal absent their

[5] Exhibits 3, 4, and 5 respectively.

compliance with the contract. On November 8 the Union also notified Respondent in writing[6] that Gottberg, Drake, Holsing and a fourth employee, Jess Moreno,[7] had failed to comply with the union security provisions of the contract and that the Union would be demanding their discharge if they did not comply within the required notice period.

On about November 13, the Respondent wrote a letter[8] to the Union stating that the three employees had religious objections to paying money into the Relief and Contingency Fund and communicated to the Union the employees' offer to pay an equivalent amount into a non-profit charity.

The Union rejected the employees' counterproposal to pay into a non-profit, non-religious charity for financial reasons. At the time the proposal was made, three of the eight bargaining unit employees were claiming that their refusal to join the Union or to pay the equivalent of dues was based on religious reasons. The union dues are $12.00 per month. The Union also maintains that if it made the proposed accommodation for these three employees, other employees would also try to avoid the union security clause by claiming a similar exemption. Thus, the Union states that its

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[6] Exhibit 6.

[7] The status of Moreno is not in issue here as his refusal to join the Union was not based upon religious reasons, and the Respondent subsequently discharged Moreno upon the Union's demand.

[8] Exhibit 7.

already diminished financial base would become further weakened.

On November 21 the Union notified Respondent by letter[9] that Gottberg, Drake and Holsing had not complied with the union security clause in the contract and demanded that the Respondent terminate them.[10] By letter dated November 28,[11] the Respondent informed the Union that it was declining to discharge Gottberg, Drake and Holsing as it believed it would be in violation of the Civil Rights Act of 1964 to do so. As a result of the Respondent's adherence to this position, the Union filed charges in the instant case.

The stipulation is made without prejudice to any objection that any party may have as to the materiality or competency of any facts seated herein.

..... Dated: .....
Lester V. Smith, Jr.
Counsel for Respondent

..... Dated: .....
Bernard Jolles
Counsel for the Union

..... Dated: .....
Marilyn J. W. Cesarano
Counsel for the General Counsel

---

[9] Exhibit 8.

[10] The Union's letters to the employees and Respondent dated November 8 and November 21 were properly sent according to the collective bargaining agreement and met the guidelines set by the Board in such matters.

[11] Exhibit 9.

Local ..... hereby offers the following accommodation to accommodate your religious needs and practices and the union's need for all members of the bargaining unit to share the financial burden of collective bargaining:

1. You may pay and keep current your union dues. You need not join or remain a member.

2. You will be relieved from any obligation to picket or otherwise participate in any labor dispute without loss of your right to strike benefits in the event the membership decides to strike. This right is conditional upon your willingness to perform some non-strike related activities to be assigned by the union.

3. You will retain all negotiated union benefits.

4. You need not vote in union elections or participate in union meetings unless you choose to do so.

We feel this represents a complete accommodation of your need to freely practice your religion and the union's need for financial support, in order to fully and fairly represent all members of the bargaining unit.

LUMBER PRODUCTION & INDUSTRIAL WORKERS UNION

Local No. 2519

United Brotherhood of Carpenters & Joiners
of America — A.F.L.-.C.I.O

Carpenter Center Building, 2512 2nd Ave., Room. 205

Seattle, Washington 98121

November 8th, 1978

Mr. Leon Gottberg
% Scandia Log Homes
7303 - 22nd Southeast
Woodinville, Wash. 98072

Dear Sir and Brother:

According to the records of the Union you have failed to comply with the Union Security Clause and the special accommodation offered to you because of your religious beliefs whereas, you would not have to become a member and would be allowed to pay a like amount of the Union's monthly dues into the Union's Relief and Contingency fund.

Copy of the Union Security Clause is enclosed.

The amount due is $60.00 (July, August, September, October and November dues.)

The dismissal of any employee for failure to comply with the provision of this article shall be on written notice from the Union to the Company and employee, setting forth the reason for his delinquent

status and allowing *seven (7) days* from receipt of notice to bring his membership into good standing.

It is understood and agreed, that all new employees shall be considered probationary employees for a period of thirty (30) days from date of hire.

Fraternally yours,

/s/ *Bob Biringer*
Lumber Production and Industrial
Workers Union Local #2519

RFB/11
o.p.e.i.u. #8
AFL-CIO
Certified No. 771122

Exhibit 3

LUMBER PRODUCTION & INDUSTRIAL WORKERS UNION
Local No. 2519
United Brotherhood of Carpenters & Joiners
of America — A.F.L.-.C.I.O
Carpenter Center Building, 2512 2nd Ave., Room. 205
Seattle, Washington 98121

November 8th, 1978

Mr. John Drake
% Scandia Log Homes
7303 - 22nd Southeast
Woodinville, Wash. 98072

Dear Sir and Brother:

According to the records of the Union you have failed to comply with the Union Security Clause and the special accommodation offered to you because of your religious beliefs whereas, you would not have to become a member and would be allowed to pay a like amount of the Union's monthly dues into the Union's Relief and Contingency fund.

Copy of the Union Security Clause is enclosed.

The amount due is $60.00 (July, August, September, October and November dues.)

The dismissal of any employee for failure to comply with the provision of this article shall be on written notice from the Union to the Company and employee, setting forth the reason for his delinquent status and allowing *seven (7) days* from receipt of notice to bring his membership into good standing.

It is understood and agreed, that all new employees shall be considered probationary employees for a period of thirty (30) days from date of hire.

Fraternally yours,

/s/ *Bob Biringer*
Lumber Production and Industrial
Workers Union Local #2519

RFB/11
o.p.e.i.u. #8
AFL-CIO
Certified No. 771123

Exhibit 4

LUMBER PRODUCTION & INDUSTRIAL WORKERS UNION
Local No. 2519
United Brotherhood of Carpenters & Joiners
of America — A.F.L.-.C.I.O
Carpenter Center Building, 2512 2nd Ave., Room. 205
Seattle, Washington 98121

November 8th, 1978

Mr. Kevin Holsing
% Scandia Log Homes
7303 222nd Southeast
Woodinville, Wash. 98072

Dear Sir and Brother:

According to the records of the Union you have failed to comply with the Union Security Clause and the special accommodation offered to you because of your religious beliefs whereas, you would not have to become a member and would be allowed to pay a like amount of the Union's monthly dues into the Union's Relief and Contingency fund.

Copy of the Union Security Clause is enclosed.

The amount due is $60.00 (July, August, September, October and November dues.)

The dismissal of any employee for failure to comply with the provision of this article shall be on written notice from the Union to the Company and employee, setting forth the reason for his delinquent status and allowing *seven (7) days* from receipt of notice to bring his membership into good standing.

It is understood and agreed, that all new employees shall be considered probationary employees for a period of thirty (30) days from date of hire.

Fraternally yours,

/s/ Bob Biringer
Lumber Production and Industrial
Workers Union Local #2519

RFB/11
o.p.e.i.u. #8
AFL-CIO
Certified No. 771124

Exhibit 5

LUMBER PRODUCTION & INDUSTRIAL WORKERS UNION
Local No. 2519
United Brotherhood of Carpenters & Joiners
of America — A.F.L.-.C.I.O
Carpenter Center Building, 2512 2nd Ave., Room. 205
Seattle, Washington 98121

November 8th, 1978

Mr. Jens Nielsen
% Scandia Log Homes
7303 - 222nd Southeast
Woodinville, Washington 98072

Dear Sir:

According to the records of the Union we find that you have in your employ the following employee(s) who have failed to make application for membership, and/or have failed to keep their membership dues in good standing as per the terms of the Union Security Clause in our Working agreement which allows 7 days from receipt of this notice to bring their membership into good standing:

Leon Gottberg, John Drake, and Kevin Holsing have failed to keep their membership dues in good standing. Jess Moreno has failed to make application for membership.

We have given these employee(s) ample time to get themselves squared away, but they have failed to do so. We therefore request, that their employment be terminated according to the Union Security Clause of our Working Agreement. We will notify you on or after the 8th day, the standing of these people.

We will appreciate your compliance with this request without unnecessary delay. We remain,

Respectfully yours,

/s/ *Bob Biringer*
Lumber Production and Industrial
Workers Union Local No. 2519

Certified No. 578717

Exhibit 6

Attachment I

SCANDIA LOG HOMES
(Incorporated)

7303 - 22nd Southeast, Woodinville, Washington 98072
Phone (206) 486-????

November 13, 1978

Mr. Robert Biringer
Lumber, Production and Industrial Workers
Local 2519
2512 Second Avenue
Seattle, Washington 98121

Dear Mr. Biringer:

This letter is in response to your letter informing the Company that you may ask for the discharge of Leon Gotberg, Gevin Holsing, John Drake, and Jess Moreno. As you know, Mr. Gotberg, Mr. Holsing and Mr. Drake have bonafide religious objections to joining or paying dues to a union. The Company and the Union have had several meetings in attempting to accommodate the religious beliefs of these employees. On October 23, 1978, we mailed you two recent Ninth Circuit Court cases *Anderson* v. *General Dynamics*, 17FEP 1644 and *Burns* v. *Southern Pacific Transportation Company*, 17 FEP 1648. These cases basically state that if an employee has bonafide religious objections to paying dues to a union, the employee would have the option to pay equivalent of union dues to a charitable organization. Also, in *Anderson* v. *General Dynamics*, the court said that the employee has the

option of paying the "equivalent of union dues to charity of his choice."

On November 9, the Company and the Union met with Mr. Gotberg, Mr. Holsing and Mr. Drake. The Union offered an accommodation to the employees which we understand to be as follows:

a) waive membership and union activity;

b) pay the equivalent of union dues to the union contingency fund which pays union dues of destitute/retired union members.

It is my understanding that those employees have rejected that proposal because they think they are still in effect paying union dues and that violates their religious beliefs.

The employees have offered this accommodation: They will pay the equivalent of union dues to a non-religious charity such as the Boy Scouts, United Fund, etc. You may ask for proof of payment if you accept their offer. Please let us know if this offer is acceptable to you.

We are of the understanding that Jess Moreno has no religious objections to paying union dues. We will await your communication as to whether or not Mr. Moreno pays his dues.

Please let us know your position on the other employees accommodation as soon as possible.

Sincerely yours,

Jens Nielsen
cc: TOC-Redmond

LUMBER PRODUCTION & INDUSTRIAL WORKERS UNION
Local No. 2519
United Brotherhood of Carpenters & Joiners
of America — A.F.L.-.C.I.O
Carpenter Center Building, 2512 2nd Ave., Room. 205
Seattle, Washington 98121

November 21st, 1978

Scandia Log Homes, Inc.:
Mr. Jens Nielson, Officers, Agents or
Representatives
7303 - 222nd South East
Woodinville, Washington 98072

Dear Sirs:

This letter is to officially notify you that the following named employees have not complied with the Union Security Clause in the Working Agreement between Scandia Log Homes and the Lumber Production and Industrial Workers Union, Local 2519. Having notified them in accordance with the Union Security Clause we are demanding the following employees be terminated on receipt of this letter: Leon Gottberg, John Drake, Kevin Holsing and Jess Morino.

We will appreciate your compliance with this request without delay.

The following named employees were offered special accommodations because of religious beliefs and agreed to supply the Union with a letter from their

Church Officers stating that they were members of the church which they did not comply with: Leon Gottberg, John Drake, and Kevin Holsing.

Respectfully yours,

/s/ *Robert F. Biringer*
Robert F. Biringer, F.S.T.—B.R.

RFB/lk
o.p.e.i.u. #8
AFL-CIO
Certified No. 578722
c.c. T.O.C.

Exhibit 8

SCANDIA LOG HOMES
(Incorporated)

7303-222nd Southeast, Woodinville, Washington 98072
Phone (206) 483-????

November 28, 1978

Mr. Robert Biringer
Lumber, Production and Industrial Workers
Local Union 2519
2512 Second Avenue
Seattle, Washington 98121

Dear Mr. Biringer:

This letter refers to your letter dated November 21, 1978 dem...ding the discharge of Leon Gotberg, Kevin Holsing and John Drake for not paying dues to the union or the union contingency fund. As you know, the Company and the Union have met several times in an effort to resolve this matter. In a letter dated November 13, 1978, we documented the fact that Mr. Gotberg, Mr. Holsing, and Mr. Drake have offered to pay the equivalent of union dues to a non-religious charity such as the Boy Scouts, United Fund, etc. In addition, these employees have communicated this accommodation directly to the union. It is our opinion, according to *Anderson* v. *General Dynamics*, 17 FEP and *Burns* v. *Southern Pacific Transport Company*, 17 FEP 1648, that we would be in violation of the Civil Rights Act of 1964 if we were to discharge those three employees. Therefore, it is the Company's opinion that it would be illegal to discharge those employees and we respectfully decline to discharge them.

To our knowledge, Jess Moreno has no religious objections to paying union dues. Accordingly, we have discharged Jess Moreno as you demanded in your letter of November 21, 1978.

Sincerely yours,

Jens Nielsen

Exhibit 9

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

Marie D. Wilson, Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
2401 E Street, N. W.
Washington, D.C. 20506

Dear Ms. Wilson:

The General Counsel of the National Labor Relations Board (Board) hereby files the following comment concerning Section 1605.2(c)(4) of the proposed *Guidelines on Discrimination Because of Religion.*

On April 16, 1979, the General Counsel of the Board issued the attached complaint in *Scandia Log Homes,* Case 19-CA-10925. In essence, our position in that litigation is that, under the National Labor Relations Act (the Act), a union-security clause can be fully enforced as to all employees covered by the collective bargaining agreement, including employees who have religious objections to paying dues to a union. In our view, Congress did not amend the Act when it passed the relevant religious discrimination provisions in 1972. The sole amendment to the Act came later, in 1974, when Congress created special union-security rules for religious objectors employed by health care institutions. See Sections 19 of the Act.

It should be noted that the position set forth above is the prosecutorial position taken by the General Counsel before the Board. The Board itself will rule

on the matter in due course. However, if the Board agrees with our position that Title VII mandates no special treatment for religious objectors, then Section 1605.2(c)(4) would create a direct conflict between the National Labor Relations Board's enforcement of the Act and the EEOC's enforcement of Title VII.

The parties recently agreed to stipulate the facts of this case to the Board in lieu of a hearing before an Administrative Law Judge. Assuming that the Board accepts the stipulation, it will consider and decide the case on the basis of the stipulation and the arguments presented.

In view of the above, you may wish to hold proposed Section 1605.2(c)(4) in abeyance pending Board and court adjudication. In addition, you may wish to seek permission from the Board to file a brief *amicus curiae* in support of your views, and to seek permission from the reviewing court assuming the case reaches this stage.

Please advise us if you desire any further information in this regard, further elucidation of the General Counsel's position in this matter, or any other information about the case.

Thank you for your consideration of our views, and for your cooperation.

Sincerely,

John S. Irving
General Counsel